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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 178

TUSKEGEE INSTITUTE,

Petitioner,

v.

THE BANK OF NEW YORK, as Trustee of the Trust established by ARTHUR B EMMONS by Indenture dated May 8, 1916, THE BANK OF NEW YORK, as Executor of the Will of JULIA W. EMMONS, deceased, THE TRUSTEES OF ROBERT COLLEGE OF ISTANBUL, THE METROPOLITAN MUSEUM OF ART, THE NEWPORT HOSPITAL, BEREA COLLEGE, IRVING B. KINGSFORD and CLEVELAND E. DODGE as Executors of the Will of EDITH C. KINGSFORD, THE AMERICAN MUSEUM OF NATURAL HISTORY, AMERICAN UNIVERSITY OF BEIRUT, HAMPTON INSTITUTE, RICHARD S. HUMPHREY, JR., JOAN HUMPHREY WATKINS, MARION HUMPHREY JACOBSON, ELIZABETH A. CURTIS, MARIE JOHNSON, AUGUST R MEYER, HENRY H. MEYER, JR., MARY MEYER, GEORGE W. W BREWSTER, JR., WILLIAM L. BREWSTER, HENRY BREWSTER, HARRIET TERRY, THEODORE O. BREWSTER, BENJAMIN BREWSTER, HENRY DAVENPORT, THE MERCHANTS NATIONAL BANK OF BOSTON and HENRY HIXON MEYER as trustees under an agreement and declaration of trust dated August 31, 1956 made by HENRY DAVENPORT, ROBERT W. EMMONS, JR., CLARA EMMONS LEVY, GARDNER EMMONS, WILLIAM B. EMMONS, JR., NATHANIEL PARKINSON as executor of the estate of MARY E. PARKINSON, IRVIN McD. GARFIELD, JR., ELEANOR GARFIELD, JANE G. CHEEVER, SISTER FRANCES ELIZABETH OF ALL SAINTS, GEORGE B. EMMONS, ELIZABETH EMMONS HOLMES, HARTFORD NATIONAL BANK & TRUST COMPANY, DOROTHY EMMONS SERENIUS, MARTHA EMMONS FLYNN and MARGARET EMMONS MILLER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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THE BANK OF NEW YORK, as Trustee of the Trust established by ARTHUR B. EMMONS by Indenture dated May 8, 1916, THE BANK OF NEW YORK, as Executor of the Will of JULIA W. EMMONS, deceased, THE TRUSTEES OF ROBERT COLLEGE OF ISTANBUL, THE METROPOLITAN MUSEUM OF ART, THE NEWPORT HOSPITAL, BEREA COLLEGE, IRVING B. KINGSFORD and CLEVELAND E. DODGE as Executors of the Will of EDITH C. KINGSFORD, THE AMERICAN MUSEUM OF NATURAL HISTORY, AMERICAN UNIVERSITY OF BEIRUT, HAMPTON INSTITUTE, RICHARD S. HUMPHREY, JR., JOAN HUMPHREY WATKINS, MARION HUMPHREY JACOBSON, ELIZABETH A. CURTIS, MARIE JOHNSON, AUGUST R. MEYER, HENRY H. MEYER, JR., MARY MEYER, GEORGE W. W. BREWSTER, JR., WILLIAM L. BREWSTER, HENRY BREWSTER, HARRIET TERRY, THEODORE O. BREWSTER, BENJAMIN BREWSTER, HENRY DAVENPORT, THE MERCHANTS NATIONAL BANK OF BOSTON and HENRY HIXON MEYER as trustees under an agreement and declaration of trust dated August 31, 1956 made by HENRY DAVENPORT, ROBERT W. EMMONS, JR., CLARA EMMONS LEVY, GARDNER EMMONS, WILLIAM B. EMMONS, JR., NATHANIEL PARKINSON as executor of the estate of MARY E. PARKINSON, IRVIN MCD. GARFIELD, JR., ELEANOR GARFIELD, JANE G. CHEEVER, SISTER FRANCES ELIZABETH OF ALL SAINTS, GEORGE B. EMMONS, ELIZABETH EMMONS HOLMES, HARTFORD NATIONAL BANK & TRUST COMPANY, DOROTHY EMMONS SEBENIUS, MARTHA EMMONS FLYNN and MARGARET EMMONS MILLER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

TUSKEGEE INSTITUTE prays that a writ of certiorari issue to review the decision of the Court of Appeals of the State of New York in this case.

Opinions Below.

Under the name of *Matter of Emmons*, the New York Court of Appeals rendered its decision on March 30, 1961, without opinion. 9 N. Y. 2d. . The only opinion in this case is that of an Official Referee (R 191) reprinted at Appendix A-7 hereof. The Order of the Official Referee, made the Order of the Court, appears at R 14-24. Such order was affirmed by the Appellate Division, 10 A. D. 2d 570, without opinion (R 214). The Appendix hereto contains the Remittitur of the Court of Appeals, the Order on Remittitur of the Supreme Court, New York County, (made May 1, 1961), the opinion of the Official Referee, and the second decretal paragraph of the original Order of the Official Referee.

In view of the extreme length of the original petition of the trustee, this Court is respectfully referred at this point to paragraphs 31 and 35 of the supplemental petition, which show prior judicial disposal of other issues not before this Court.

Jurisdiction.

The order and judgment of the Court of Appeals was made March 30, 1961. An order on remittitur dated the first day of May, 1961 was made by the Supreme Court, New York County and filed in the Office of the County Clerk that day. The jurisdiction of this court is invoked under 28 U. S. C. 1257 (3) conferring jurisdiction on this Court over final judgments or decrees rendered by the highest court of the State of New York, in a proceeding where titles, rights, privileges or immunities were especially set up or claimed under the Constitution of the United States.

1. Finality.

The original petition contained four prayers for instructions. The supplemental petition (paragraph 31. R. 145) and (paragraph 35, R146) shows that the first, third and fourth prayers had been finally determined before any lower court passed upon the issue here involved. The second prayer for relief was heard and determined separately. It is the subject of this petition for certiorari.

The decision of the Court of Appeals is final in that it determined the issue in the petition and finally disposed of all the property involved in favor of one class of persons and to the exclusion of the other class of persons among which Tuskegee Institute is one. The Court of Appeals held that Rhode Island law governed the fund of some $3,600,000. It has therefore specifically passed upon paragraph 23 (R71) of the original petition and has granted a final instruction by separate order in accordance with the second prayer for relief in said petition (R74). Petitioner Tuskegee can have no interest in the further ministerial accounting in and among the class from whom it has been

finally excluded. Petitioner Tuskegee may not be heard further in any New York court in connection with any matter the subject of the trustee's petition.

By applying Rhode Island law the New York court has held that the fund is a part of principal, and consequently is to be distributed to the heirs of Arthur B. Emmons. Tuskegee, and those similarly situated, take under the Will of Julia W. Emmons, the deceased income beneficiary, and they are therefore forever foreclosed by the final action of the Court of Appeals. The judgment of the Court of Appeals is, therefore, final in the language of this court contained in *Market Street Railway Company* v. *Railroad Commission* 324 U. S. 548, 551,

> "It must be subject to no further review or correction in any other State Tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

2. Deprivation of Tuskegee's Constitutional rights were specifically set up and claimed in the Court below.

Petitioner claims deprivation of constitutional rights by *judicial* decision arising upon a stipulated record. Thus, the constitutional issues could be raised *only* on brief in the Court of Appeals.

The proceeding below was brought under Article 79 of the Civil Practice Act (Sections 1307-1319). The sole question involved in the Court of Appeals was contained in paragraph 23 (R. 71), wherein the Trustee requested approval to apply New York law. The relevant portion thereof reads:

> "The petitioner is advised and believes that such securities so received (or such reinvestments thereof)

> in the trust under the Indenture are subject to apportionment between principal and income under the so-called Osborne Rule of New York law."

Petitioner Tuskegee was and is in full agreement with the trustee's petition and contends here for the instruction and the relief prayed therein, namely that New York law be applied. No responsive pleading is required by such Article 79, and moreover Tuskegee admitted below and admits here the particular paragraph above quoted.

Petitioner Tuskegee was not bound at its peril to anticipate that the New York court of first instance, or its Appellate Division (both being two parts of the same court) would without any rational basis in the stipulated record deprive it of vested property. The only thing Tuskegee could do was to argue on brief and in oral argument to the Court of Appeals the constitutional points which are raised here.

There are cases which hold that questions as to the unconstitutionality of a *statute* may not be raised for the first time in the New York Court of Appeals. *Dodge* v. *Cornelius,* 168 N. Y. 242; *Nathan* v. *Equitable Trust Company,* 250 N. Y. 250. But the doctrine in New York, so far as the holdings of the cases are concerned, does not and cannot apply to judicial decisions which cannot be anticipated.

It has long been settled law that where a litigant invokes the protection of the Federal Constitution at the "first opportunity" it may be heard in this Court on constitutional grounds. In *State of Missouri, ex rel. Missouri Insurance Company* v. *Gehner,* 281 U. S. 313, this court stated (320):

> "It may not reasonably be held that the company was bound to anticipate such a construction or in advance to invoke Federal protection against the

> taxation of its United States bonds. Upon the facts disclosed by this record it is clear that appellant sufficiently raised in the highest court of the State, the Federal questions here presented, and is entitled to have them considered."

Here, the constitutional points were fully briefed and referred to on oral argument before the Court of Appeals—thus affording the highest state court the fullest opportunity to pass upon the federal questions. See also *Brinkerhoff-Faris Trust and Savings Company* v. *Hill*, 281 U. S. 673, and *Shelley* v. *Kraemer*, 335 U. S. 1.

Tuskegee's arguments below, all directed to the application of the same constitutional principles presented herein to the facts in this case, were contained in twenty-one pages of briefs below. Our adversaries devoted approximately eighteen pages to refuting these points and their application. Therefore, it cannot be stated that the constitutional questions, which by their nature can be raised only on brief, could "steal upon an unsuspecting" Court "and pass unobserved". *M'Culloch* v. *State of Maryland*, 4 Wheat. 316, 402.

As is set forth fully in the "Reasons for Granting the Writ" petitioner submits that there can be no valid state ground upon which the decision could have been based. In short the New York Court of Appeals, irrespective of whether all or any part of the language of the lower court opinion is ascribed to it, must be recognized to have violated petitioner's constitutional rights by its decision, although neither the Court of Appeals nor the Appellate Division of the Supreme Court wrote any opinion.

Questions Presented.

The questions presented are whether there was a rational basis in the record for the decision below in which New York ousted its own property law, abandoned its conflict of laws rules, and chose the law of another state which had no jurisdiction over the property, the agreement relating thereto, or the corporate trustee which held the property at all times in New York. This was done despite the fact that New York law was referred to in the agreement.

Arthur Emmons came into New York, which had and continues to have a certain fixed property rule; he made an agreement in New York with a New York corporation pursuant to which property in New York was transferred to that corporation as trustee.

Notwithstanding the above, the lower courts held that Rhode Island law governed the trust and have disposed of property in accordance with a Rhode Island property rule announced by its highest court fifteen years after all the relevant events.

If there was no rational basis for New York's abdicating its own law and injecting the law of another state whence Emmons came, then petitioner Tuskegee has been deprived of property which vested in it pursuant to the New York property rule without due process of law, and the obligation of contract has been impaired.

Constitutional Provisions Involved.

ARTICLE I, Section 10.

"No State shall • • • pass any • • • Law impairing the Obligation of Contracts • • •."

AMENDMENT XIV.

"• • • nor shall any State deprive any person of life, liberty, or property, without due process of law; • • •."

Statement.

The Bank of New York,• as trustee of an *inter vivos* trust, petitioned (R. 35 ff) the New York County Supreme Court for instructions authorizing it to apply New York law to stock dividends and reinvestments thereof. Under New York law such distributions are apportioned between income and principal. Tuskegee Institute, which takes under the life tenant, now deceased, was to receive a share in that portion allocated to the life tenant (estimated at $1,500,000) of the assets listed on "Exhibit C" to the petition (R. 95-96), valued at approximately $3,600,000.

Thereafter the trustee filed a supplemental petition, (R. 145) and for the first time in the entire history of this trust (R. 152), filed an accounting, apportioning corporate distributions in accordance with New York law. The case below was submitted on the pleadings and a stipulation of facts (R. 158-161).

• Non-migratory since founding by Alexander Hamilton in 1784. Chartered 1791. Moody's *Banks & Finance Manual*, page 66, (1961).

But the New York courts held that Rhode Island law, which today allocates all such corporate distributions to principal, governed.

The stipulated record shows that on May 8, 1916 in New York City, Arthur B. Emmons transferred property and made an agreement with a corporate trustee (R. 77-85). Both parties to the agreement acknowledged their signatures before the same New York Notary Public (R. 84-85). The trustee, then known as New York Life Insurance and Trust Company of New York City,** was, and now is, a New York corporation. Its present name is The Bank of New York (R. 158).

As a matter of fact, the State of New York had previously held in 1913, *Matter of Osborne*, 209 N. Y. 450, that stock dividends were to be apportioned between principal and income in accordance with the property rule contained in such opinion. As a matter of fact, this rule of property law has been reaffirmed in *Matter of Fosdick*, 4 N. Y. 2d 646 (1958) and *Matter of Bingham*, 7 N. Y. 2d 1 (1959).

As a matter of fact, in 1931, nine years after the death of Arthur Emmons, the Supreme Court of Rhode Island stated in *Rhode Island Hospital Trust Company, et al.* v. *Tucker*, 51 R. I. 507:

> "The question is whether shares of stock, or the rights to subscribe therefor, issued against surplus earned during the continuation of the trust is income, to be delivered to the life tenants, or corpus to be retained for the ultimate benefit of the remainderman." (page 508)

and

> "This is the first time that this question which has given rise to so many different rules with vary-

** Non-migratory only since 1830, Moody's *supra*.

ing modifications and so much conflict of authority, has been presented to the Court." (page 508)

Upon reargument that court stated:

> "If at the time of the testatrix's death it had been settled law in this state that stock dividends were not income, *it would have been the duty of the trustee to sell* the securities in question and reinvest the proceeds in income-producing property." 52 R. I. 277, 279 (1932). (emphasis added)

From the time of the transfer of the property in New York and the making of the trust agreement, all assets of the trust have been located in New York. The entire administration of such assets and performance by the trustee under the trust agreement has been conducted in New York State (R. 159).

The income of the trust was payable to Arthur Emmons's wife, Julia W. Emmons, during her life and upon her death to their only child, Elizabeth W. Emmons (R. 79). Arthur Emmons died in 1922. His daughter Elizabeth died in 1936, unmarried and without issue. Julia Emmons died in 1956 and upon her death the trust terminated (R. 159).

The only reference to the law of any state in the agreement is contained in paragraph EIGHTH thereof, which provides (R. 83) as follows:

> "EIGHTH: The party of the second part hereto shall be entitled to receive commissions on both Principal and Income at the rates now allowed by law in the State of New York, viz.: Five (5) per cent. on the first One thousand (1,000) Dollars, cash or property, received and paid out; two and one-half (2½) per cent. on the next Ten thousand (10,000) Dollars, cash or property, received and paid out;

and one (1) per cent. on the balance of cash or property received and paid out."

Arthur Emmons is identified in the trust agreement as being "of Newport, Rhode Island" (R. 77) where he in fact resided until his death, as did his daughter and wife until their respective deaths.

The record does not disclose who the individual remaindermen were or where they resided at the time the trust agreement was made and the property was transferred. The petition discloses that at the time it was prepared there were many remaindermen in England and throughout the United States. Tuskegee Institute was named specifically in the Will of Julia Emmons (R. 54) and in the Will of Arthur Emmons (R. 87).

The trust agreement has no provision with respect to allocation of corporate distributions. In fact, during the six years that Arthur Emmons lived after making the trust agreement he was on two occasions advised that fractional shares of General Electric stock, received as a 2% stock dividend, had been redeemed for cash, which the trustee credited to the income account of the trust. (R. 177, 181). There were during such period, however, nine stock dividends (R. 163), of which only two were mentioned to Arthur Emmons in correspondence with the trustee. Therefore, seven of such stock dividends during his life were not mentioned at all.

Tuskegee Institute is one of the residuary legatees of Julia Emmons (R. 54). Therefore, upon her death in 1956 Tuskegee Institute had a vested remainder in her estate, a property right. The Bank of New York, as trustee under the agreement with Arthur Emmons, owed to itself in its capacity as executor of the Will of Julia Emmons, deceased, all moneys and property which belonged to her as life

tenant. It petitioned under Article 79 of the Civil Practice Act for permission to apportion stock dividends in accordance with New York law, and pay that portion allocable to the life tenant to her estate.

Petitioner Tuskegee admits, and was, and is, in accord with, paragraph 23 of the petition (R. 71), and the second prayer for relief (R. 74). The Bank of New York in its two separate capacities as trustee under the *inter vivos* agreement with Arthur Emmons and as executor of the Will of Julia Emmons was represented by two separate firms of attorneys. Fifteen firms of attorneys signed the stipulation of facts herein, two of such firms representing The Bank of New York in its two separate capacities.

The matter was submitted on the pleadings and the stipulation to the Supreme Court, New York County, and its decision was accompanied by an opinion (R. 191-197) which is the sole opinion rendered by any court in this proceeding. The lower court held that the corporate distributions were governed by Rhode Island law, which rules such property to be principal, thus going to the remaindermen of Arthur Emmons, and not going to the remaindermen of Julia Emmons, of which Tuskegee is one. The Appellate Division affirmed such decision without opinion (R. 214). In the Court of Appeals petitioner Tuskegee filed separate briefs which adopted the points argued by Messrs. Davis, Polk, Wardwell, Sunderland & Kiendl on behalf of the bank as executor of Julia Emmons and those taking under her Will. In addition Tuskegee Institute raised and preserved the constitutional points over which this court has jurisdiction. The Court of Appeals affirmed the decision of the Appellate Division without opinion.

There was also before both divisions of the lower court in New York a question involving a testamentary trust of

Arthur Emmons. No appeal was taken to the Court of Appeals with regard to the testamentary trust, and although it is referred to in the record, it is of no concern to this Court. Paragraph 4 of the Petition (R. 36) shows that an intermediate accounting under such testamentary trust was judicially settled in 1929, seven years after his death.

Reasons for Granting the Writ.

Summary.

We do not seek review of a "trusts" case. We do not seek review of "property law". It is unimportant here that final disposition of more than an estimated $1,500,000 has been effected below.

What is important is that there must be a rational basis for choice of law. Strictly speaking, we contend that New York ousted its own law, and substituted that of another state. It is our contention that importing foreign law into the case was wholly arbitrary. In this stipulated record there is no fact sufficient to afford a basis for "choice". There was abdication of the law of the only state having "jurisdiction" and substitution of the law of an outside state which never had jurisdiction over the trust agreement, the trustee, or the property.

The cases are legion where the forum exercises too much power. In this case the forum had both plenary and exclusive power. Yet it abdicated its law and substituted that of another state. This appears to be, and probably is, a case of first impression.

Choice of law is determined by facts in a record. There must be evidence to support "intent" or "contact" or "gravity" or whatever reasonable basis permits a conscious choice.

The important thing in choice of law is not where a man comes from. The important thing is the jurisdiction he goes into and what he does there. Every event, every act took place in New York. And in the course of such acts in New York Arthur Emmons referred to the law of this state and found the then existing state of New York law satisfactory. In fact, in the only mention of any law in the *inter vivos* agreement, Emmons carefully incorporated existing New York law and provided against change by referring to "commissions on both principal and income at the rates *now* allowed by law in the State of New York, viz.: * * *" And he then specified with particularity the rates of such commissions. Thus, all juridical acts point to New York law.

There is not a scintilla of evidence to indicate that Emmons thought himself a creature of status, impressed for all time with the character of Rhode Island law, even as it might be promulgated years after his death. There is not a scintilla of evidence that Emmons considered himself disabled from freely contracting with respect to any matter or in any jurisdiction.

In view of the overwhelming and conclusive evidence that New York law governed all aspects of the transfer of property and the agreement relating thereto, nothing but the most express direction in the instrument itself could possibly bring any other law into consideration.

In 1913 the fundamental property question here involved was settled in New York law in *Matter of Osborne, supra.* As recently as 1959 it was reaffirmed. Thus, the property law of New York, into which Emmons came and to which he committed his property and his agreement, had been clear for several years prior to the time he did so, and it remains clear today.

Fifteen years after Emmons made his New York agreement and committed his property to the protection of the law of that state, the state of his domicile rendered a decision which held that all stock dividends are principal, and not income. Rhode Island first enunciated its law in *Rhode Island Hospital Trust Co., et al.* v. *Tucker,* 51 R. I. 507, (1931) wherein its highest court stated:

> "This is the first time that this question, which has given rise to so many different rules with varying modifications and so much conflict of authority has been presented to the Court" (page 508).

And subsequently on reargument in attempted mitigation of the harshness of their own decision that court stated:

> "If at the time of the Testatrix's death it had been settled law in this state that stock dividends were not income, it *would* have been the duty of the Trustee to sell the securities in question and reinvest the proceeds in income-producing property" 52 R. I. 277, 279 (1932).

Thus, at the time Emmons came into this state to transfer property, make an agreement and refer to New York law, the property law of this state was clearly settled. He did not speak any language of his home, because there was no language of his home for him to speak. There is no Rhode Island idiom in the agreement. He could not have had any specific intent that a Rhode Island doctrine, not yet even enunciated according to the Supreme Court of that state fifteen years later, should be invoked many years later to take away from his wife, the income beneficiary of the trust and the natural object of his bounty, the income which was rightfully hers, and which vested in petitioner Tuskegee under the terms of her Will.

Thus, the ultimate question in this case is identical to that in *Thompson* v. *Louisville*, 362 U. S. 199 where this court stated:

> "The ultimate question presented to us is whether the charges against petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment. Decision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all." (199)
>
> "Thus we find no evidence whatever in the record to support these convictions. Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt." (206)

All of the foregoing, together with the arguments more specifically set forth hereinafter, were called to the attention of the Court of Appeals in New York, which nevertheless affirmed the decision below, divesting petitioner Tuskegee of property and impairing the obligation of contract, with no rational basis in the record.

The argument following contains a brief description of New York property law, New York conflicts rules, and a discussion of the constitutional questions over which this Court has jurisdiction.

I.

New York Law.

A.

New York Property Law.

There was no difference among the parties below as to the substantive law of New York in connection with corporate distributions in the form of stock dividends. It is set forth in *Matter of Osborne*, 209 N. Y. 450 (1913) where at page 477 the Court of Appeals stated:

> "It should be held: 1. Ordinary dividends, regardless of the time when the surplus out of which they are payable was accumulated, should be paid to the life beneficiaries of the trust. 2. Extraordinary dividends, payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they entrench in whole or in part upon the capital of the trust fund as received from the testator or maker of the trust or invested in the stock, in which case such extraordinary dividends should be returned to the trust fund or apportioned between the trust fund and the life beneficiary in such a way as to preserve the integrity of the trust fund."

This principle, clearly set forth as property law of New York three years before Emmons came into New York and made his agreement there and transferred property, continues to be the law of New York. Only express direction in a trust agreement can prevent the operation of the property rule. *Equitable Trust Company* v. *Prentice*, 250 N. Y. 1.

Frontal assaults have been made upon the rule in recent years, but it is crystal clear that the rule is an expression

of vested property rights which can be changed prospectively only by the legislature. *Matter of Fosdick,* 4 N. Y. 2d 646 (1958); *Matter of Bingham,* 7 N. Y. 2d 1 (1959).

The instrument in *Matter of Osborne, supra,* directed the payment of "net income" to the beneficiaries and "principal" to the remaindermen, just as in the case at bar. In connection with the administration of that trust, the New York court was required to determine the property rights among the classes of beneficiaries. Therefore the property law question presented to the court was identical to that in the case at bar. Here, upon the happening of events contemplated by the trust agreement, property has vested in a remainderman.

B.

New York Conflict of Laws Rules.

We do not ask this court to prescribe for New York or for any state a system of conflict of laws. Prior to the case at bar, the New York rules for choice of law were clear, well-settled and sound.

Reference to prior New York decisions is the clearest method of demonstrating the complete departure of the case at bar from the realm of fact to the realm of unsupported presumptions and conjecture.

The New York Court of Appeals held in *Hutchison* v. *Ross,* 262 N. Y. 381 that an *inter vivos* trust partly executed in New York and partly executed in Quebec, pursuant to which the property was transferred in New York, was a valid trust. It stated at page 392:

> "* * * And for the first time our court is called upon to decide directly the question whether trusts of securities made *inter vivos* shall be governed by the same rules as testamentary trusts or by the same rules as other conveyances *inter vivos.*"

The court squarely held that *inter vivos* trusts were to be governed by the same rules as other conveyances *inter vivos*. It did so in a powerful opinion which carefully reviewed the underlying reasons for the decision.

The Court of Appeals considered whether a settlor is presumed to speak the language of his domicile and the maxim *mobilia sequuntur personam*. That court firmly barred the maxim from entry into the law of this state involving *inter vivos* trusts. The court, moreover, extirpated the maxim from the dicta of this state.

Since that case and one other case discussed below are the only Court of Appeals cases with any direct bearing on the issues, the following quotations are set forth at more than customary length. This Court is respectfully invited to examine the careful reasoning contained in pages 388 through 395 of the opinion. The court stated:

> "When the owner of personal property authorizes its removal from his domicile or acquires property elsewhere *he must be deemed to know that his property comes under the protection and subject to the laws of the jurisdiction to which it has been removed,* and that appeal may be made to the courts of that jurisdiction for the determination of conflicting rights in such property." (388, emphasis added)

Mr. Emmons of course, not only knew that New York law applied, but he specifically embraced it in the form that it then was. (Paragraph EIGHTH, R. 83).

And, in stating the importance of soundly based criteria for choice of law the court stated:

> "Though public policy and comity may be decisive in the determination of what law shall be applied in given circumstances, 'it does not belong to the judges to recognize or to deny the rights which individuals may claim under it, at their pleasure or

> caprice; but, it having obtained the force of law by user and acquiescence, it belongs only to the political government of the state to change it whenever a change becomes desirable'. (*Parsons* v. *Lyman* 20 N. Y. 103, 112). Here, as in other branches of the law, there should be certainty of rule and uniformity of application, and we must look to the judicial decisions and legislative enactment for guidance." (389)

The court then carefully reviewed the rules with respect to valid conveyances of chattels in conflict of laws and international law and then stated:

> "We are dealing with a conveyance in trust of documents which in the market place are treated as property and not merely evidence of property. (*Cf. Pierpoint* v. *Hoyt*, 260 N. Y. 26), and consider no other question." (391)

The court then set forth the fundamental practical reasons for its decision, which reasons are compelling, however any particular question before a court may be characterized.

> "In all the affairs of life there has been a vast increase of mobility. Residence is growing less and less the focal point of existence and its practical effect is steadily diminishing. Men living in one jurisdiction often conduct their affairs in other jurisdictions, and keep their securities there. Trusts are created in business and financial centers by settlors residing elsewhere. A settlor, regardless of residence, cannot establish a trust to be administered here which offends our public policy. If we hold that a non-resident settlor may also not establish a trust of personal property here which offends the public policy of his domicile, we shackle both the non-resident settlor and the resident trustee. (pages 393-394)."

And the Court of Appeals further stated:

> "Here there is no express declaration of intention, but the intention is implied in every act and word of the parties." (395)

The other case of importance in the Court of Appeals is *Shannon* v. *Irving Trust Company*, 275 N. Y. 95 which held that where "intent" was expressly "manifest" in the instrument, where there was "positive direction" as to what law applied, the court in a proper case would honor such unequivocal and express intention. The case is discussed at greater length, *infra*, pages 27 to 28.

The principles set forth in these cases have been applied by the lower courts in decisions, not officially reported unless otherwise designated, as follows: *In re Jarvie's Trust*, 73 N. Y. S. 2d 246, *Application of Eyre*, 133 N. Y. S. 2d 511; *In re Davis' Trust*, 133 N. Y. S. 2d 525; *Shipman* v. *Title Guarantee & Trust Co.* 20 N. Y. S. 2d 508; *Guaranty Trust Co. of New York* v. *Brunton*, 74 N. Y. S. 2d 254; *In re Lowman's Trust*, 92 N. Y. S. 2d 238; *In re Griswold's Trust*, 99 N. Y. S. 2d 420; *Matter of McKinney*, 5 Misc. 2d 210.

II.

Petitioner has been deprived of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States

and

The obligation of Contract has been impaired to the detriment of Petitioner, Tuskegee Institute.

In the simplest terms, a decision without rational basis in the record is a denial of due process of law. From this fundamental denial of constitutional rights others flow, as

occurred in the case at bar. It was clearly shown below that there was no basis for ousting New York law, divesting property which had vested pursuant to contract right and impairing the contract.

Even if there had been a Rhode Island law of stock dividends at the time Emmons made his New York agreement, the decision below would offend the due process clause, because there is no fact in this record which permits the ousting of New York law and the substitution of Rhode Island law.

But the case at bar is far stronger. The Supreme Court of Rhode Island itself, fifteen years after the occurrence of all juridical facts in the case at bar stated in *Rhode Island Hospital Trust Co., et al.* v. *Tucker,* 51 R. I. 507 (1931):

> "The question is whether shares of stock, or the rights to subscribe therefor, issued against surplus earned during the continuation of the trust is income, to be delivered to the life tenants, or corpus to be retained for the ultimate benefit of the remainderman." (Page 508).
>
> and
>
> "This is the first time that this question which has given rise to so many different rules with varying modifications and so much conflict of authority, has been presented to the court." (Page 508).

And subsequently the case was reargued to seek relief from the hardship imposed by the sweeping mechanical rule enunciated by Rhode Island, and that court in partial mitigation of the harshness of its decision stated in 1932:

> "If at the time of the testatrix's death it had been settled law in this state that stock dividends were not income, it *would have been the duty of the trustee to sell* the securities in question and reinvest the proceeds in income-producing property." 52 R. I. 277, 279. (emphasis added)

The Supreme Court of Rhode Island therefore stated:

1. The question,

2. That it was the first time the question had been presented to it, and

3. On reargument that the question was not theretofore "settled law", or other duties would have devolved upon the trustee.

The New York decision does not rest merely upon that state's ascribing to itself greater knowledge of Rhode Island law than the Rhode Island court owned up to. The New York court had to find as a fact in this stipulated record that Arthur Emmons had a specific prescience and foreknowledge of a doctrine not yet enunciated. Such foreknowledge must have been sufficient for him, as an act of will, to have had a specific intent that such law govern his transfer and agreement in New York.

The mind is incapable of enumerating all the fallacies of such reasoning. This Court has conclusively closed the door on "strained" presumptions. It follows *a fortiori* that invocation of a presumption, which is impossible to defend, likewise offends due process of law. In *Tot* v. *United States*, 319 U. S. 463, this Court stated (page 467):

> "Under our decisions a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts."

Courts are bound by the same constitution as legislatures. *Shelley* v. *Kraemer*, 334 U. S. 1.

In the case at bar the "proved fact" is that Rhode Island language was not spoken until fifteen years after Emmons made his New York agreement. There can be "no rational connection" between language which had not yet come into being (hence, non-existent language) and the "ultimate fact presumed" that Emmons spoke the language of his home.

The presumption is logically precluded. A bare and vagrant maxim, unrooted in any fact, has usurped the judicial process and has been substituted for the rational process of inference from proved fact to ultimate fact and legal conclusion.

Thus, the substantive and procedural due process rights of Tuskegee Institute have been violated, and vested property arising upon contract rights has been divested by the impairment of the contract. This has been done by invoking a presumption, although the factual prerequisite to such presumption has been shown not to have existed.

Square support for petitioner's position is contained in Section 43-e of the Tentative Draft of the Restatement of Conflicts of Laws (Restatement of the Law (Second) Conflict of Laws, Tentative Draft No. 3, April 19, 1956). It is clearly recognized in "Comment C" that if the forum applies the law of a state which has no sufficient contact to legislate, then it volates the Fourteenth Amendment. In the case at bar, certainly Rhode Island had absolutely no power to legislate with respect to the conveyance made in New York, the agreement made in New York, the agreement to be performed in New York and the performance thereof in New York. "Comment C" (p. 23) follows:

> "c. A state has legislative jurisdiction if its contacts with a person, thing or occurrence are sufficient

to make it reasonable to apply that state's law to affect legal interests. Unless limited by a constitution, each state develops and applies its own rules of jurisdiction which in turn are based upon that state's notions of reasonableness. In this country, it is a violation of the due process clause of the Fourteenth Amendment to the Constitution for a court to apply the law of a state *(which may be either that of the forum or of some other state)* which has no legislative jurisdiction according to rules laid down by the Supreme Court of the United States. Such action is void in the offending state itself (*Home Insurance Co.* v. *Dick*, 281 U. S. 397 (1930)) and will not be recognized elsewhere." (Emphasis added)

And the note (page 20) introducing the subject of legislative jurisdiction, which defines "law" as being both common and statutory, contains the following comment:

"Introductory Note: As used in the Restatement of this Subject, 'legislative jurisdiction' is concerned with the permissible range of application of the law (both common and statutory) of a state. Such jurisdiction exists when, consistently with the principles stated in §42, a state's law can be applied to create or affect legal interests in a given situation. A question of legislative jurisdiction is raised whenever a state's law is so applied whether by one of its own political organs (frequently a court) or by that of another state.

In the United States, this subject largely falls within the area of constitutional law. A state violates the due process clause of the Fourteenth Amendment if it applies its law to a state of facts over which it has no legislative jurisdiction (*Home Insurance Co.* v. *Dick*, 281 U. S. 397 (1930)); *it likewise would violate due process if it were to apply the law of another state which has no such jurisdiction* (cf. *Young* v. *Masci*, 289 U. S. 253 (1933).)" (Emphasis added)

Hanson v. *Denckla*, 357 U. S. 239, is square authority for the fact that neither the Rhode Island courts nor the Rhode Island legislature had any power whatever over the New York trustee and the trust property situated in New York. It is noteworthy in that case that the settlor, many years after establishing the trust, exercised a power of appointment in Florida, her domiciliary state. No such fact is involved in the case at bar. We have only a single agreement and conveyance in New York. Therefore, as we understand the dissent in the *Hanson* case in which three Justices joined, all of the members of this Court would recognize that in the case at bar Rhode Island never had or acquired jurisdiction over the trustee, the agreement, or the trust property. Since Rhode Island was a state devoid of power, it was an unconstitutional violation of the due process clause for New York to abdicate its own law and import and inject into this case the law of Rhode Island.

New York is the only state with jurisdiction over the agreement, the trustee, or the property.

In order that these fundamental and long-standing principles of jurisdiction and choice of law should be clearly brought before the Court of Appeals in New York, the line of insurance cases, including both opinions of this Court in *Clay* v. *Sun Insurance Office, Ltd.*, 363 U. S. 207, and the cases cited therein, were brought to the attention of the Court of Appeals on brief below. The *reductio ad absurdum* of the result below can be shown by assuming a New York resident were to go into the State of Connecticut, the insurance center of the nation just as New York is the banking center of the nation, and there obtain an insurance policy from a Connecticut corporation covering property in Connecticut. Then assume further that loss occurred to the Connecticut property, and in an action in a Connecticut court the law of the insured's domicile, i.e., New York, were

to be applied. Surely there would be no rational basis for failing to apply Connecticut law in such a case.

Mr. Justice Brandeis in *Kryger* v. *Wilson*, 242 U. S. 171 discussed a claim of deprivation of due process of law where a contract for the sale of land was terminated by one of the parties in accordance with the law of the situs of the land (North Dakota), but not in accordance with the law of the place where the contract was made (Minnesota). In deciding a subsequent suit to quiet title arising out of a proceeding in North Dakota, this Court held that there had been no violation of due process of law and that the most that could be said was that there was an error in the application of the doctrines of conflict of laws. Of course, both states had jurisdiction; that is, had sufficient contact with the transaction to furnish the basis of jurisdiction. That situation is to be contrasted with the case at bar where, once Emmons left that state and transferred property in New York to a New York corporate trustee, Rhode Island had no contact with or jurisdiction over the trust property, the agreement, or the trustee. *Hanson* v. *Denckla*, *supra*.

Of course, we do not here contend for a sweeping surveillance by this Court over choice of law questions in general. We do not ask this Court to prescribe a system or to set general limits. The only thing we contend for is that the judicial decision here, on this record, denied due process of law. Indeed, we do not in any way attack prior holdings of the New York Court of Appeals. It is our contention that prior decisions of that Court are sound and point the way to decision in this case. For example, in *Shannon* v. *Irving Trust Company*, 275 N. Y. 95, which together with the *Hutchison* case, *supra*, constitute the only decisions of the Court of Appeals with any real bearing upon the issues, a New Jersey resident established a New York trust with a

corporate trustee, and he specified in precise language that New York law should govern commissions

> "but otherwise the laws of the State of New Jersey shall govern this trust indenture and any construction to be placed thereupon or interpretation thereof." (101)

The Court of Appeals stated (102):

> "The intent is manifest; no uncertainty exists."

The Court of Appeals therefore applied New Jersey law, even though New York's rule against perpetuities was violated. The Court stated:

> "The positive direction contained in the trust instrument that the validity of the trust should be determined by the law of the settlor's domicile must prevail. Our decision here does not extend, however, beyond instances where conflict arises between the domiciliary law of the settlor and the law of the situs of the trust where the construction and validity of trusts *inter vivos* are involved." (105)

In evaluating this opinion we should bear in mind first that the intent was "manifest", and not left to conjecture. The court also referred to "positive direction". These two expressions of the Court of Appeals demonstrate that New York does not have sterile, mechanical rules of conflict of laws.

Therefore, in the *Shannon* case there was domicile plus something else. That something else, the "manifest" intent and "positive direction", should have differentiated the case at bar in the minds of the lower court, and do differentiate the case at bar from the *Shannon* case for the purpose of the due process clause in this Court. In the case at bar there is a reference only to New York law, and at the very least an

implied intent that New York law should govern. Just prior to the conveyance and the New York agreement, Rhode Island lost all contact with future events when Emmons left that state. His domicile was a bare address. It was not in any way tied in with the transaction by the word, deed or intent of either contracting party.

The lower court's opinion, however, does refer to intent via the presumption that the settlor was presumed to speak the language of his domicile. We have shown above that in the *Tucker* case the Supreme Court of Rhode Island thought otherwise, when it stated that the question was before it for the "first time", and on reargument that it was not theretofore "settled law". Examination of the *Tucker* case shows that the Supreme Court of Rhode Island carefully reviewed the English rule, the Pennsylvania rule (from which the New York Osborne rule is derived), the Massachusetts rule (which the *Tucker* case adopted) and then stated (510):

> "The Massachusetts rule, as applied to so-called stock dividends, although probably not approved by a majority of courts, is followed in many jurisdictions including the United States Supreme Court. See *Gibbons* v. *Mahon*, 136 U. S. 549, 10 S. Ct. 1057, 34 L. Ed. 525 * * *" (other citations omitted).

Then the Rhode Island court dealt with earlier Rhode Island decisions—the same ones referred to in the only opinion in this case and *limited those early Rhode Island decisions as follows:*

> "The same principle applies to rights to subscribe for stock and to rights to subscribe for debentures and bonds convertible into stock of the issuing company. In each instance a portion of corporate surplus has been permanently capitalized. See *Greene* v. *Smith*, 17 R. I. 28, 19 A. 1081; In re *Brown*, 14 R. I. 37; 15 Am. Rep. 397." (510)

Therefore, the Rhode Island Supreme Court recognized such early Rhode Island cases to cover only the limited question of subscription rights. If those early Rhode Island cases had the meaning, even though cryptic, argued by our adversaries below and ascribed to those cases by the sole opinion herein, there would have been no occasion for the unequivocal statement by the Supreme Court of Rhode Island that the matter was one of first impression, and it would have been wholly redundant to refer to the many differing property rules which that Court so carefully canvassed.

In passing, one further comment is permissible, and that is that the Rhode Island court criticized the Pennsylvania rule (and therefore the New York Osborne Rule) as being an attempt by the courts to do "justice" (510). The Rhode Island court disavowed any such attempt, stating that they could not change the provisions of an instrument to conform to their ideas of justice between life tenants and remaindermen. It is clear therefore, that the Rhode Island court considered itself to be dealing firmly and unequivocally with words of *legal effect* determining *property rights.*

No manifest intent, no positive direction can be inferred from historical research into the obscure headwaters of the law of a sister state. An intent cannot be implied, nor can we infer an intent on this record, except in the direction of New York.

Much has been made of Emmons' legal knowledge in arguments below. Surely, then, he must be deemed to have had knowledge of the *Osborne Rule* enunciated in 1913 in New York three years before Emmons went there to make his agreement and conveyance, rather than of the non-existent language of his domicile. One can as well impute knowledge of Esperanto to Noah Webster or Dr. Johnson

as to claim that lawyer Emmons anticipated the speech of the Rhode Island Court by a decade and a half.

Indeed, the settlor's legal learning led him to fix definitely, in the only mention of *any* law, "commissions • • • at the rates now allowed by law in the State of New York • • •" (R. 83). The settlor showed a concern for law, explicit at the time he made an agreement in writing in New York, before a New York notary public, and transferred property in New York.

Such an explicit settlor can hardly have granted or intended unbridled linguistic invention, retroactively attributed and applied.

Emmons came into New York mute. There he made a New York agreement, transferred New York property, and referred to New York law. He never at any time spoke the legal dialect or idiom of his own hearth.

What matters is that no court can properly invoke such a presumption or fiction as the language of one's domicile, and thereafter undertake to invent the very language which afforded the sole justification for invoking the presumption.

Even where the language of one's domicile has been clearly articulated, it can be introduced into the financial and business center of the world to determine legal questions involving *inter vivos* agreements made here, and transfers made here, only by reverting to primitive law, under which it was assumed that every man carried his own tribal laws and household gods with him. But to do so would be to convert the center of world commerce into the Tower of Babel.

By contrast, and taking no account of fictions, the facts are that Emmons came into New York to make an agreement. Property there was transferred there. The contract was to be performed there and was performed there. New

York was the only forum. Its law was the only law referred to by Emmons.

Below we drew the attention of the Court of Appeals to Judge Cardozo's famous statement in *Loucks* v. *Standard Oil,* 224 N. Y. 99, 109:

> "• • • the theory of the statute personal, a body of national law which the citizen carries about with him • • • is a theory which has yielded generally in this country to the territorial system and the doctrine of vested rights."

We also drew the court's attention to the words of another lawyer, who practiced briefly in Boston as did Emmons, and who wrote for a unanimous Court the following:

> "• • • the Constitution and the first principles of legal thinking allow the law of the place where a contract is made to determine the validity and the consequences of the act." Holmes, J., in *Mutual Life Ins. Co. of N. Y.* v. *Liebing,* 259 U. S. 209, 214.

So far as this record is concerned, we do not think those decisions should in any way be affected by another fountainhead opinion, that of Judge Learned Hand in *Direction Der Disconto-Gesellschaft* v. *U. S. Steel Corporation,* 300 Fed. 741, 744 (S. D. N. Y. 1924).

In both our main brief and reply brief we referred to the important developments, which have emphasized more and more since these famous cases, the increasing importance of the law of situs of property, of the place of performance, and of the forum and the interests protected by it, as reviewed by the opinions in this Court in *Clay* v. *Sun Insurance Office, Ltd., supra,* and the discussion in other insurance cases.

Yet, on arguments below respondents relied on precursors of the *Tucker* case, *supra,* thereby simply demonstrating the unsettled state of Rhode Island law until fifteen years after the juridical acts performed by Emmons in New York. Since it was not settled law, any certitude ascribed to Mr. Emmons about property law meaning sufficient to permit us to assume he had that law in mind, necessarily means that his certitude and knowledge were greater than that of the Rhode Island S. reme Court. The only alternative to such a preposterous presumption is to say that New York can abdicate its own law and choose foreign law on grounds so tenuous as second guessing the Supreme Court of a sister state, which never had or obtained jurisdiction over the trustee, the agreement, or the property.

We do not know what route the Court of Appeals took in reaching its decision that the agreement should be governed by the law of Rhode Island and the property rights thus determined.

The court of first instance reached its decision by a gratuitous "characterization" of the case. It said that if the question were one of "administration" or "validity" that New York law would govern, but it characterized the question as being one of "construction".

In the first place, there is no ambiguity to construe.

In the second place, both Rhode Island in the *Tucker* case, *supra,* and New York in the *Osborne* case, *supra,* treat the words as being of legal effect determining property rights and not as words to be construed.

In the third place, there was no construction by the courts, but an ousting of law.

In the fourth place the characterization can have no energy of its own and is a mere abstraction.

In the fifth place it is commonly recognized that the question of what receipts and expenses are allocable to

income and what to principal is a question of "administration." 4 *Powell on Real Property,* paragraph 534, page 198, Swabenland, *The Conflict of Laws in Administration of Express Trusts of Personal Property*, 45 Yale L. J. 438, 440 (1936); Cavers, *Trusts Inter Vivos and The Conflict of Laws,* 44 Harv. L. Rev. 161, 164 (1930); Land, *Trusts in The Conflict of Laws* (1940) page 197.

Professor Austin W. Scott, chief consultant on the revision of the Restatement of Conflict of Laws has reviewed in a succinct address the proposals with respect to trusts. "What Law Governs Trusts?" 99 *Trusts and Estates,* 186 (March 1960), 3 Prentice-Hall *Wills, Estates and Trust Service,* paragraph 5438. He stated:

> "Questions of administration include those relating to the powers and duties and liabilities of the trustee.
>
> They include questions as to:
>
> —What are proper investments
> —What receipts and expenses are allocable to income and what to principal
> • • • • "

In what appears to be the latest discussion entitled "Trusts of Movables in The Conflict of Laws" contained in 36 N. Y. U. Law Review 713 (1961), the authors of such note refer to the case at bar and particularly to the problem of characterization. They observe:

> "The tentative draft of the new Restatement would alleviate this problem of characterization by ceasing to recognize separate rules for construction. If construction concerns the validity of trusts, the choice of law rules concerning validity will be applied. On the other hand, if construction concerns adminis-

> tration, choice of law rules applicable to administration will be followed." (714)

The proposed Restatement rule would thus abolish the characterization so artificially contrived.

In what appears to be the only New York case squarely in point, *Bank of New York* v. *Shillito*, 14 N. Y. S. 2d 458 (not officially reported), the question was whether Massachusetts or New York law governed stock dividends. The court first held, as stated in the opinion, that a question of construction was involved and that Massachusetts law should govern. Thereafter, the Judge reversed himself and held that New York law should apply because the question was one of administration of the trust. The reversal is unreported, but several briefs below referred to it or quoted from the motion papers which showed the question of stock dividends was governed by New York law as a matter of "administration."

Domicile, unless it is linked to a relevant fact, a manifest intent, or a positive direction (*Shannon* v. *Irving Trust Co. supra*) has no more meaning than previous condition of servitude or any other abstract description of status or identification. An abstraction, unlinked to a fact in the record, cannot foreclose inquiry, preclude the judicial process, and dispose of a case. In arguments below, Respondents here sought to furnish the missing link under the name and style of Harvard Law School, which Mr. Emmons attended. While this is perhaps more specific than other aspects of New England osmosis argued below, it is no less fatuous. The law of the sole state having jurisdiction cannot be ousted by conjecture.

If we were to permit ourselves the sort of conjecture argued below, we might refer to a leading Massachusetts case on conflict of laws, decided in 1878 about the time

Emmons commenced the practice of law in Boston, *Milliken* v. *Pratt,* 125 Mass. 374, which held in a broad opinion that continental doctrines of domiciliary law had retreated before the territorial law of the English speaking world, even as to contracts of married women. And if we were to conjecture as to Emmons' subjective state of mind, concerning which this record is barren except for his election of existing New York law in one connection, we might refer to a classic expression in 1875, about the time when Emmons commenced the study of law:

> "* * * if there is one thing which more than any other public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice." *Printing Co.* v. *Sampson,* L. R. 19 Eq. Cas. 462.

But the massing of conjectures on either side is not the business of courts.

Departure from a jurisdiction is not "contact" with it. Exit from a jurisdiction adds no weight or "gravity" to the departed jurisdiction.

Entrance into a jurisdiction does not show or imply an intent to avoid the jurisdiction of the destination, especially where formal juridical acts under seal are done at the destination and existing law of the destination embraced.

Upon the basis of the facts in this stipulated record we concluded in our brief below:

> "There is no rational basis in this record for ousting New York law, taking property and impairing contract. A decision without a rational basis in the record cannot stand. *Thompson* v. *Louisville,* 362 U. S. 199, 80 S. Ct. 624; *Schware* v. *Board of Bar Examiners of N. M.,* 353 U. S. 232, 77 S. Ct. 756."

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari in this case should be granted.

Respectfully submitted,

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Appendix to Petition for Certiorari.

Remittitur

No. 415

(SEAL) 9403
1956

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 30th day of March in the year of our Lord one thousand nine hundred and sixty-one, before the Judges of said Court.

WITNESS:

The Hon. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

Remittitur March 30, 1961.

(SEAL)

No. 415

IN THE MATTER OF

The Application of THE BANK OF NEW YORK, as Trustee under the Will of ARTHUR B. EMMONS, &c.

THE BANK OF NEW YORK, as Executor of the Will of JULIA W. EMMONS, Deceased, & ors., &c.,

Appellants,

THE BANK OF NEW YORK, as Trustee under the Will of ARTHUR B. EMMONS, &c.,

Petitioner-Respondent,

RICHARD S. HUMPHREY, JR., & ors., &c.,

Respondents.

BE IT REMEMBERED, That on the 30th day of November in the year of our Lord one thousand nine hundred and sixty, The Bank of New York, as Executor of the Will of Julia W. Emmons, Deceased, & ors., &c., the appellants in this cause, came here unto the Court of Appeals, by Davis, Polk, Wardwell, Sunderland & Kiendl, & ors., their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The Bank of New York, as Trustee under the Will of Arthur B. Emmons, &c., the petitioner-respondent, and Richard S. Humphrey, Jr., & ors., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Emmet, Marvin & Martin, and Dewey, Ballantine, Bushby, Palmer & Wood, & ors., their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

(SEAL)

WHEREUPON, The said Court of Appeals, having heard this cause argued by Mr. Walter D. Fletcher, of counsel for all the appellants except Tuskegee, and by Mr. Clendon H. Lee, of counsel for the appellant Tuskegee, and by Mr. John L. Gray, Jr., of counsel for the respondents Humphrey, & ors., and by Mr. Daniel G. Tenney, Jr., of counsel for the respondents Curtis, & ors., and by Mr. Jacquelin A. Swords, of counsel for the respondents Parkinson, & ors., and by Mr. Munn Brewer, of counsel for the respondents Holmes, & ors., submitted by the respondents Sister Frances Elizabeth of All Saints and George B. Emmons, submitted by the petitioner-respondent, no appearance for the remaining respondents,

and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is affirmed, with costs to all parties appearing separately and filing separate briefs, payable out of the trust estate.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

(SEAL)

THEREFORE, it is considered that the said order be affirmed, with costs &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York.

before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

RAYMOND J. CANNON

Clerk of the Court of Appeals of the State of New York

Court of Appeals, Clerk's Office
Albany, March 30, 1961.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

State of New York
Court of Appeals

RAYMOND J. CANNON,

Clerk.

Order on Remittitur.

At a Special Term, Part II, of the Supreme Court of the State of New York, held in and for the County of New York at the County Court House in the Borough of Manhattan, City, County and State of New York, on the 1st day of May, 1961.

Present:

Honorable SAMUEL M. GOLD,
Justice.

IN THE MATTER *of* The Application of THE BANK OF NEW YORK, as Trustee under the Will of ARTHUR B. EMMONS and as Trustee of the trust established by ARTHUR B. EMMONS by Indenture dated May 8, 1916, for a construction of said Will and of said Indenture and further relief.	Index No. 9403-1956. Order on Remittitur.

The respondents, The Bank of New York, as Executor of the Will of Julia W. Emmons, Deceased, The American Museum of Natural History, The Trustees of Robert College of Istanbul, The Metropolitan Museum of Art, The Newport Hospital, Berea College, American University of Beirut, Hampton Institute, Tuskegee Institute and Irving B. Kingsford and Cleveland E. Dodge, as Executors of the Will of Edith C. Kingsford, Deceased, pursuant to leave granted by the Court of Appeals in and by an order dated June 9, 1960, having appealed to the Court of Appeals from the order of affirmance herein of the Appellate Division, First Department, entered in the Office of the Clerk of the Appellate Division, First Department, on January

26, 1960, to the extent that said order of said Appellate Division affirmed so much of the order herein of the Supreme Court, New York County, made and entered March 20, 1959, as ordered, adjudged and decreed that dividends and other distributions in stock of the corporation declaring the same received by the petitioner for the account of the trust established by Arthur B. Emmons by Indenture dated May 8, 1916, should be allocated to the principal of said trust in accordance with the law of Rhode Island and that the allocation as between trust principal and trust income of other securities received by the petitioner for the account of said 1916 trust as dividends and other corporate distributions should be governed by the law of Rhode Island and so construed said Indenture;

And said appeals having been duly argued in the Court of Appeals; and after due deliberation the Court of Appeals having ordered and adjudged that the order of the Appellate Division of the Supreme Court appealed from herein be affirmed with costs to all parties appearing separately and filing separate briefs payable out of the trust estate; and the Court of Appeals having further ordered that the record on said appeals to the Court of Appeals and the proceedings in said Court be remitted to the Supreme Court of the State of New York there to be proceeded upon according to law;

Now upon reading and filing the remittitur from the Court of Appeals herein and upon the motion of Emmet, Marvin & Martin, attorneys for the petitioner, The Bank of New York, as Trustee under the Will of Arthur B. Emmons and as Trustee of the Trust established by Arthur B. Emmons by Indenture dated May 8, 1916, it is hereby

ORDERED that the order and judgment of the Court of Appeals herein be and the same hereby are made the order and judgment of this Court.

Enter

FILED
MAY 1 1961
NEW YORK
COUNTY CLERK'S OFFICE

S. M. G.,
J. S. C.

Opinion by Steuer, J.

(New York Law Journal—January 29, 1959)

Motion is respectfully referred to Official Referee Hon. Felix C. Benvenga.

Opinion by Hon. Felix Benvenga, Official Referee.

(New York Law Journal—February 5, 1959)

This is a proceeding under article 79 of the Civil Practice Act for a judicial construction of two separate trusts created by Arthur B. Emmons, namely: (1) an inter vivos trust under an indenture made in May, 1916, and (2) a residuary trust under a will executed in April, 1922.

Emmons, the settlor, was born in Massachusetts in 1850. He was a graduate of Harvard Law School; was admitted to the Massachusetts Bar in 1879, and practiced law in Boston. He was married in 1891 and there was one issue of the marriage—a daughter, born in 1894 in Newport, Rhode Island. Before his marriage, Emmons left Massachusetts and took up residence in Newport, where he lived with his family until his death.

In May, 1916, Emmons entered into a trust indenture with the Bank of New York (formerly N. Y. Life Ins. & Trust Co.), a New York corporation, as trustee. The indenture was executed at the trustee's place of business in the City of New York. In accordance therewith, Emmons conveyed to the bank certain property to be held in trust, with the provision that, during the existence of the trust, the entire "net income" arising therefrom was to be distributed to his wife and, if she should predecease his daughter, to his daughter; and, upon the death of the survivor without issue, the bank was to pay over the remainder of the principal to the settlor's nephews and nieces.

In April, 1922, Emmons made and executed a will in Rhode Island, designating the same bank as trustee of the residuary trust. He directed the trustee to pay one-half of all the rest of the "net income" of the trust thereby created to his wife during her life, and the remaining one-half, and after his wife's death, the whole of the "income" to his daughter during her life, with the provision (as in the case of the indenture) that upon the death of the survivor without issue, the trustee was to pay the remainder of the trust fund to the testator's nephews and nieces.

In July, 1922, shortly after the execution of his will, Emmons died. His daughter died in October, 1936, without issue, and his wife passed away in May, 1956, thus terminating both trusts.

Since the establishment of the trust indenture in 1916 and the creation of the testamentary trust in 1922, stock dividends have been received in both trusts and credited by the bank to principal. The trust instruments, however, are silent as to whether these stock dividends should be treated as "income" or as "principal." In other words, there is no provision in the instrument as to whether the law of Rhode Island or the law of New York should be applied in interpreting or construing them. Nor is there any express declaration of intention as to whether the stock dividends should be allocated to principal in accordance with the Rhode Island rule (see R. I. Hospital Tr. Co. *v.* Tucker, 51 R. I. 507, 509-510; 52 R. I. 277), or apportioned between principal and income in accordance with the New York rule (see Matter of Osborne, 209 N. Y. 450, 477). This failure to provide presents the sole issue in this proceeding. The other issues have already been determined (see Matter of Emmons, N. Y. L. J., December 17, 1956, p. 6, aff'd 3 App. Div. 2d 909). And by stipulation, the parties have agreed that the remaining question be decided by the undersigned as an official referee, since the original proceeding came on before him as a justice of this court. 1. Clearly, the problem here is one of interpretation or construction, the meaning of the language used in the trust instruments or the legal effect of such language. Under elementary principles,

therefore, the instruments must be so interpreted or construed as to give effect to, or carry out, the settlor's intention (Equitable Trust Co. *v.* Prentice, 250 N. Y. 1, 8, 9; Matter of Battell, 286 N. Y. 97, 102; Matter of Kadjar, 200 Misc. 260, 270, aff'd 279 App. Div. 1008, app. den. 304 N. Y. 987). The "decisive test" here is not one of legality, but of "presumable" intention (Equitable Trust Co. *v.* Prentice, *supra*).

The presumption is that the settlor of a trust of personal property spoke the language of his home and intended the trust instrument to be interpreted and construed in accordance with the law and usage of his domicile. Accordingly in the absence of "controlling circumstances" or "strong inference" to the contrary, the instruments must be determined in accordance with the law and usage of the domicile of the settlor at the time of the execution of such instruments. And this principle applies whether the trust was created by indenture or by will, "because the problem is that of ascertaining the meaning of the words used." In short, "one speaks, presumably, the language of his home, and the usage of his domicile is the principal element of interpretation, though of course not the only one" (Restatement, Conflict of Laws, secs. 296, 308; 2 Beale, Conflict of Laws, secs. 296.1, 308.1; Matter of Kadjar, 200 Misc. 260, 270, aff'd 279 App. Div. 1008, app. den. 304 N. Y. 987; Matter of Pratt, 1 Misc. 2d 428, 429; Matter of Duke, 181 Misc. 529, 535; Bank of N. Y. *v.* Shillito, 14 N. Y. S. 2d 458, 462-463; see Matter of Battell, 286 N. Y. 97, 102, citing Restatement, *supra*, sec. 296).

This principle, according to the 1935 New York Supplement to the Restatement, is consistent with the New York rule (citing Maynard *v.* Farmers L. & T. Co., 208 App. Div. 112, 116, aff'd 238 N. Y. 592; Curtis *v.* Curtis, 185 App. Div. 391, 395; City Bank Farmers Trust Co. *v.* Whiteing, 136 Misc. 416, 419; Cary *v.* Carman, 116 Misc. 463, 470—cases decided prior to the decisions already cited). 2. The principal facts and circumstances upon which Mrs. Emmons' legatees rely to establish their contention that it was the settlor's intention that the trust instruments should be

interpreted and construed in accordance with the New York law, are: (1) the trust indenture was executed in New York; (2) the domicile of the trustees bank is New York; (3) the situs of the trust is New York; (4) the site or seat of administration is New York, and (5) the indenture provides that the trustee's commissions are to paid at the rate allowed under the New York law.

On the other hand, the chief factors upon which settlor's remaindermen rely to substantiate their argument that it was the settlor's intention that the trust instruments should be interpreted and construed in accordance with the Rhode Island law, are: (1) the settlor and his beneficiaries were domiciled in Rhode Island; (2) the will was executed and probated in Rhode Island; (3) the instrument which created the testamentary trust was the last instrument executed; (4) stock dividends were, during the life of the settlor and apparently with his knowledge and consent, credited to principal, and (5) that the settlor was a member of the Massachusetts bar.

It is argued that, as a member of the Massachusetts bar, the settlor may have been familiar with the leading Massachusetts case of Minot *v.* Paine (99 Mass. 101), decided in 1868, under which stock dividends are allocated to principal. And, as a resident of Rhode Island, he may have been aware of the fact that Rhode Island had adopted the Massachusetts rule as early as 1844 (see Brown's petition, 14 R. I. 371)—long before the trusts were created.

In any event, in determining the settlor's presumed intention, all the facts and circumstances surrounding the execution of both trust instruments should be taken together and considered in combination, and not singly. When so considered, it is fair to assume that the settlor intended that the stock dividends should be allocated to principal in accordance with the Rhode Island rule. And it is equally fair to suppose that, had he intended that the stock dividends should be apportioned between principal and income in accordance with the New York rule, he would expressly

have so provided—especially in view of his legal background and training.

Unquestionably, the facts and circumstances upon which Mrs. Emmons' legatees rely would be significant, if not controlling, if the point at issue involved the validity or administration of the trusts. But, as the problem here is one of interpretation or construction, the facts and circumstances relied upon are plainly insufficient to rebut the presumption that the settlor spoke the language of his domicile and intended that the trust instruments be interpreted and construed in accordance therewith.

Moreover, the fact that the settlor, a non-resident, chose a New York bank as a trustee is not significant. That is a very common occurrence. Besides, the settlor's brother-in-law (his wife's brother) was a vice-president of the bank so chosen. That that circumstance played an important part in selecting the trustee of the trusts here involved is not at all unlikely.

3. Nor does Hutchinson v. Ross (262 N. Y. 381), which Mrs. Emmons' legatees describe as the "guiding light," and upon which they mainly rely, support their claim that the problem here is, in essence, one of administration and not construction; and that, as New York is the site or seat of the trust, the trust instruments must be construed in accordance with the law of this state.

The Hutchinson case involved the validity of an inter vivos trust of personal property; the trust being invalid under the law of the domicile, but valid under the law of this state. The court, overruling prior dicta to the contrary (at p. 393), held that the validity of the trust must be determined by the law of this state, inasmuch as the property was situated here and the settlor "intended" that the trust should be administered here in accordance with the law of this state (at p. 395). In other words, as the later Shannon case (Shannon v. Irving Trust Co., 275 N. Y. 95) points out, the domicile of the settlor is "no longer the absolute and controlling consideration" in determining the validity of a trust, but rather the "express or clearly

implied intent" of the settlor (at pp. 101-102). See Re Griswold's Trust, 99 N. Y. S. 2d 420, 428, *et seq.*)

But, although the Hutchison and other cases on which Mr. Emmons' legatees rely are distinguishable, they are not inconsistent with the principle underlying the presumption that the settlor spoke the language of his domicile and intended that the trust instruments should be interpreted and construed in accordance with the domiciliary law. Also, the Hutchison and other cases are consistent with the principle that the interpretation and construction of a trust instrument depends upon the settlor's intent, express or implied.

Mrs. Emmons' legatees also place strong reliance upon the views of certain text writers and commentators to the effect that the law governing the validity, administration and *construction* of instruments creating a trust of personal property is the law of the jurisdiction having the largest number of trust "contacts" or factual "connections" within it (see 4 Powell on Real Property, 1954, sec. 534, pp. 201-202, citing Hutchison and other lower court decisions relied upon by the legatees). This is undoubtedly the rule in cases involving validity and administration, but it is not the New York rule where the issue is one of interpretation or construction. Moreover, as Professor Powell points out (*Id.*, sec. 534, at p. 199), "where the problem is one of *construction*, some courts, emphasizing the controlling *intention* of the settlor, apply the law of the settlor's domicile" (citing Cary *v.* Carman, 116 Misc. 463; Matter of Royse, 118 N. Y. S. 2d 421). And this, as we have seen, is the New York rule.

As for the lower court decisions upon which Mrs. Emmons' legatees rely, it should be noted that they all cite and purport to follow the Hutchison case. They are, therefore, distinguishable—just as the Hutchison itself is distinguishable. But a few of the cases seem to proceed upon the mistaken assumption that the Hutchison case is authority for the proposition that, where New York is the site or seat of the trust, the law of this state governs not only questions of validity and administration, but also issues of

interpretation or construction. That, as has been pointed out, is not the fact. These decisions have therefore been disregarded.

The "decisive test" here, as has been stated, is the "presumable" intention of the settlor (Equitable Trust Co. *v.* Prentice, 250 N. Y., *supra*), and the circumstances upon which Mrs. Emmons' legatees rely are insufficient to rebut the presumption that the settlor intended the domiciliary law to govern the interpretation and construction of both trust instruments.

4. The contention of the trustee bank that it was the settlor's intention that stock dividends received in the testamentary trust should be allocated to principal in accordance with the Rhode Island rule, and those received in the trust indenture should be apportioned between principal and income in accordance with the New York rule is untenable. On the basis of the evidence, it would seem that it was the settlor's intention that the stock dividends should either be allocated according to the Rhode Island rule or apportioned according to the New York rule. There is no basis for any compromise view.

It follows that the stock dividends received in both trusts should be allocated to principal in accordance with the Rhode Island rule.

Settle order in accordance herewith.

Second Decretal Paragraph of Original Order.

(R 14-24)

2. ORDERED, ADJUDGED AND DECREED that dividends and other distributions in stock of the corporation declaring the same received by the petitioner for the account of the 1916 trust should be allocated to the principal of said trust in accordance with the law of Rhode Island, and the allocation as between trust principal and trust income of other securities received by the petitioner for the account of the 1916 trust as dividends and other corporate distributions should be governed by the law of Rhode Island, and said Indenture is hereby so construed.

Enter

F. C. B.,
Official Referee.

Filed
Mar. 20, 1959
New York
Co. Clerk's Office

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SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 21 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1961.

No. 178

TUSKEGEE INSTITUTE, *Petitioner,*

v.

THE BANK OF NEW YORK, as Trustee of the Trust established by ARTHUR B. EMMONS by Indenture dated May 8, 1916, THE BANK OF NEW YORK, as Executor of the Will of JULIA W. EMMONS, deceased, THE TRUSTEES OF ROBERT COLLEGE OF ISTANBUL, THE METROPOLITAN MUSEUM OF ART, THE NEWPORT HOSPITAL, BEREA COLLEGE, IRVING B. KINGSFORD and CLEVELAND E. DODGE as Executors of the Will of EDITH C. KINGSFORD, THE AMERICAN MUSEUM OF NATURAL HISTORY, AMERICAN UNIVERSITY OF BEIRUT, HAMPTON INSTITUTE, RICHARD S. HUMPHREY, JR., JOAN HUMPHREY WATKINS, MARION HUMPHREY JACOBSON, ELIZABETH A. CURTIS, MARIE JOHNSON, AUGUST R. MEYER, HENRY H. MEYER, JR., MARY MEYER, GEORGE W. W. BREWSTER, JR., WILLIAM L. BREWSTER, HENRY BREWSTER, HARRIET TERRY, THEODORE O. BREWSTER, BENJAMIN BREWSTER, HENRY DAVENPORT, THE MERCHANTS NATIONAL BANK OF BOSTON and HENRY HIXON MEYER as trustees under an agreement and declaration of trust dated August 31, 1956 made by HENRY DAVENPORT, ROBERT W. EMMONS, JR., CLARA EMMONS LEVY, GARDNER EMMONS, WILLIAM B. EMMONS, JR., NATHANIEL PARKINSON as executor of the estate of MARY E. PARKINSON, IRVIN McD. GARFIELD, JR., ELEANOR GARFIELD, JANE G. CHEEVER, SISTER FRANCES ELIZABETH OF ALL SAINTS, GEORGE B. EMMONS, ELIZABETH EMMONS HOLMES, HARTFORD NATIONAL BANK & TRUST COMPANY, DOROTHY EMMONS SEBENIUS, MARTHA EMMONS FLYNN and MARGARET EMMONS MILLER, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Memorandum on Behalf of Respondents The Bank of New York as Executor of the Will of Julia W. Emmons, Deceased, The Trustees of Robert College of Istanbul, The Metropolitan Museum of Art, The Newport Hospital, Berea College, Irving B. Kingsford and Cleveland E. Dodge as Executors of the Will of Edith C. Kingsford, The American Museum of Natural History, American University of Beirut and Hampton Institute

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For the cogent and persuasive reasons stated by petitioner Tuskegee Institute in its petition for a writ of certiorari to the Court of Appeals in this case, respondents The Bank of New York, as executor of the Will of Julia W. Emmons, deceased, The Trustees of Robert College of Istanbul, The Metropolitan Museum of Art, The Newport Hospital, Berea College, Irving B. Kingsford and Cleveland E. Dodge as executors of the Will of Edith C. Kingsford, The American Museum of Natural History, American University of Beirut and Hampton Institute acquiesce in said petition and respectfully submit that the Court should grant the same and issue a writ of certiorari to review the decision of the Court of Appeals of the State of New York in this case.

Respectfully submitted,

ANDREW Y. ROGERS,
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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 178

TUSKEGEE INSTITUTE,
Petitioner,

v.

THE BANK OF NEW YORK, as Trustee of the Trust established by ARTHUR B. EMMONS by Indenture dated May 8, 1916, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

IN BEHALF OF RESPONDENTS RICHARD S. HUMPHREY, JR., JOAN HUMPHREY WATKINS, MARION HUMPHREY JACOBSON, ELIZABETH A. CURTIS, MARIE JOHNSON, AUGUST R. MEYER, HENRY H. MEYER, JR., MARY MEYER, GEORGE W. W. BREWSTER, JR., WILLIAM L. BREWSTER, HENRY BREWSTER, HARRIET TERRY, THEODORE O. BREWSTER, BENJAMIN BREWSTER, HENRY DAVENPORT, THE MERCHANTS NATIONAL BANK OF BOSTON AND HENRY HIXON MEYER AS TRUSTEES UNDER AN AGREEMENT AND DECLARATION OF TRUST DATED AUGUST 31, 1956 MADE BY HENRY DAVENPORT, ROBERT W. EMMONS, JR., CLARA EMMONS LEVY, GARDNER EMMONS, WILLIAM B. EMMONS, JR., NATHANIEL PARKINSON AS EXECUTOR OF THE ESTATE OF MARY E. PARKINSON, IRVIN McD. GARFIELD, JR., ELEANOR GARFIELD, JANE G. CHEEVER, SISTER FRANCES ELIZABETH OF ALL SAINTS, MARGARET EMMONS BULLITT, JR., AS EXECUTRIX OF THE WILL OF MARGARET E. BULLITT, GEORGE B. EMMONS, ELIZABETH EMMONS HOLMES, HARTFORD NATIONAL BANK & TRUST COMPANY, DOROTHY EMMONS SEBENIUS, MARTHA EMMONS FLYNN AND MARGARET EMMONS MILLER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 178

TUSKEGEE INSTITUTE,

Petitioner,

v.

THE BANK OF NEW YORK, as Trustee of the Trust established by ARTHUR B. EMMONS by Indenture dated May 8, 1916, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

IN BEHALF OF RESPONDENTS RICHARD S. HUMPHREY, JR., JOAN HUMPHREY WATKINS, MARION HUMPHREY JACOBSON, ELIZABETH A. CURTIS, MARIE JOHNSON, AUGUST R. MEYER, HENRY H. MEYER, JR., MARY MEYER, GEORGE W. W. BREWSTER, JR., WILLIAM L. BREWSTER, HENRY BREWSTER, HARRIET TERRY, THEODORE O. BREWSTER, BENJAMIN BREWSTER, HENRY DAVENPORT, THE MERCHANTS NATIONAL BANK OF BOSTON AND HENRY HIXON MEYER AS TRUSTEES UNDER AN AGREEMENT AND DECLARATION OF TRUST DATED AUGUST 31, 1956 MADE BY HENRY DAVENPORT, ROBERT W. EMMONS, JR., CLARA EMMONS LEVY, GARDNER EMMONS, WILLIAM B. EMMONS, JR., NATHANIEL PARKINSON AS EXECUTOR OF THE ESTATE OF MARY E. PARKINSON, IRVIN McD. GARFIELD, JR., ELEANOR GARFIELD, JANE G. CHEEVER, SISTER FRANCES ELIZABETH OF ALL SAINTS, MARGARET EMMONS BULLITT, JR., AS EXECUTRIX OF THE WILL OF MARGARET E. BULLITT, GEORGE B. EMMONS, ELIZABETH EMMONS HOLMES, HARTFORD NATIONAL BANK & TRUST COMPANY, DOROTHY EMMONS SEBENIUS, MARTHA EMMONS FLYNN AND MARGARET EMMONS MILLER.

Statement

This brief is submitted in behalf of all those respondents who are remaindermen of the *inter vivos* trust established by Arthur B. Emmons in 1916,—and the assignees of two such remaindermen—in opposition to the petition filed herein by Tuskegee Institute, a residuary legatee under the Will of Julia W. Emmons, seeking a writ of certiorari to the Court of Appeals of the State of New York.

The executor of the will of Julia W. Emmons and the other respondents herein, all being legatees under her will, have subsequently joined in the application.

Prior Proceedings

This proceeding was instituted by the Bank of New York, as trustee under an indenture made by Arthur B. Emmons on May 8, 1916 and as trustee under Mr. Emmons' will, for a judicial construction to determine, among other things, the proper disposition of certain distributions received by the two trusts in the form of stock of the issuing companies (referred to herein as "stock dividends") (R. 35-76).

In a written opinion, Hon. Felix C. Benvenga, Official Referee, at Special Term, Supreme Court of the State of New York, New York County, held that the discovery and effectuation of Mr. Emmons' intent called for application of the law and usage of Rhode Island, rather than that of New York, in determining the allocation of stock dividends to principal or to income. Accordingly, the Referee concluded that stock dividends should be allocated to principal in accordance with the Rhode Island rule of interpreta-

tion and construction rather than be subjected to possible apportionment between principal and income in accordance with New York's so-called *Osborne* rule (R. 191-199).

The order entered on the Referee's opinion (R. 190) was unanimously affirmed without opinion by the Appellate Division, First Department (R. 210-214). Leave to appeal to the Court of Appeals was denied by the Appellate Division (10 App. Div. 2d 707 (1960)) but granted by the Court of Appeals (R. 208-209), which then also unanimously affirmed without opinion (9 N. Y. 2d 808 (1961)). No constitutional question was raised at any time in the Supreme Court, the Appellate Division, or in either application for leave to appeal to the Court of Appeals (petition, p. 5).

No appeal was taken to the New York Court of Appeals from the determination that stock dividends received by the trust under Mr. Emmons' will were also to be allocated in accordance with the Rhode Island rule (R. 203-207).

The federal constitutional question sought to be raised by the petition was urged for the first time in the New York Court of Appeals (petition, pp. 5-6).

Issues Presented

The only issue which the petition seeks to raise is whether the determination below, that Rhode Island principles of interpretation and construction should be applied in seeking the intention of a Rhode Island settlor, was so irrational as to violate the "impairment of contracts" clause of Article I, Section 8, and the "due process" clause of the Fourteenth Amendment, of the United States Constitution.

A further issue concerns the timeliness of the raising of the alleged constitutional question.

Facts

The facts were stipulated (R. 158-181).

Arthur B. Emmons was born in Massachusetts in 1850. He graduated from the Harvard Law School in 1877, and in 1879 was admitted to the bar of Massachusetts, where he practiced for four years. Sometime between 1879 and 1891, he moved to Rhode Island, and remained domiciled in that state until his death in 1922 (R. 158, 159).

Mr. Emmons' widow and his only child also died domiciled in Rhode Island, his child in 1936 and his wife in 1956 (R. 159).

By indenture dated May 8, 1916, Mr. Emmons created an *inter vivos* trust, naming as trustee a New York bank of which his brother-in-law was a vice-president (R. 160). The indenture was executed in New York, and the trust property has at all times been held and administered in that state (R. 159).

The indenture provided that the trust "income" was to be paid to Mr. Emmons' wife so long as she lived and thereafter to his daughter for her lifetime. If the daughter were to die without issue, as she did, Mr. Emmons' nephews and nieces were named as a class as remaindermen (R. 78-81).

The indenture did not elaborate on the meaning of the word "income"; nor did it state—except as such might be implicit in the word "income" itself—whether stock dividends were to be treated as income or as

principal; nor did it specify the state whose law should govern the indenture's interpretation. In the indenture, however, Mr. Emmons identified himself as being "of Newport, Rhode Island" (R. 77) and made reference to New York law solely with respect to the trustee's commissions (R. 83).

Following the creation of the *inter vivos* trust in 1916 and until Mr. Emmons' death in 1922, correspondence passed between Mr. Emmons and the trustee pertaining to various aspects of the administration of the trust (R. 159-160). During this period various stock dividends were received by the trustee and were credited to and retained in the principal account of the trust (R. 163). It does not appear that Mr. Emmons ever questioned the retention of the stock dividends in principal (R. 177, 181, 195).

In 1922, shortly before his death, Mr. Emmons executed a will which provided for a residuary trust having substantially the same terms as the indenture insofar as here material and the same lone connection with New York—his brother-in-law's bank as trustee (R. 86-94, 192).

Stock dividends received in both the *inter vivos* and testamentary trusts continued to be retained in trust principal during the period from Mr. Emmons' death in 1922 until his widow's death in 1956. It does not appear that the widow ever made claim to any of them.

Official Referee's Opinion

In the only opinion rendered by the New York courts, the Honorable Felix Benvenga, Official Referee,

recited many of the foregoing facts (R. 191-192) and then declared (R. 193) that

> ". . . the problem here is one of interpretation or construction, the meaning of the language used in the trust instruments or the legal effect of such language."

as to which he then said (R. 193),

> "The presumption is that the settlor of a trust of personal property spoke the language of his home and intended the trust instrument to be interpreted and construed in accordance with the law and usage in his domicile."

After considering all the facts and circumstances surrounding the execution of the trust, he concluded (R. 195) that

> ". . . it is fair to assume that the settlor intended that the stock dividends should be allocated to principal in accordance with the Rhode Island rule."

Ample authority was cited in support of these premises and conclusions (R. 193-194).

Summary of These Respondents' Argument

Even if there were any constitutional question inherent in this litigation and the decisions of the New York courts—and none appears in the record—it was not seasonably raised and this Court therefore lacks jurisdiction to consider it (POINT I).

Quite apart from the failure of petitioner and the other respondents to raise any constitutional claim in timely fashion, the case involved issues of state law alone and presented no constitutional question whatsoever (POINT II).

POINT I.

This Court Lacks Jurisdiction Because the Purported Constitutional Question Neither Appears on the Record Nor was Seasonably Raised in Accordance with the Requirements of New York Law.

The rule has long been settled that this Court is without power under 28 U. S. C. § 1257(3) to review the determination of a state court for alleged violation of rights guaranteed by the Constitution of the United States where the federal question does not appear upon an examination of the record.

In *Lynch* v. *New York*, 293 U. S. 52 (1934), this Court said, at page 54:

> "* * *. But jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record.
>
> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

See also *Seaboard Air Line Railway* v. *Duvall*, 225 U. S. 477 (1912).

Here, the federal question now raised by petitioner was raised neither in the pleadings nor elsewhere in

the record. Both the New York Court of Appeals and the Appellate Division unanimously affirmed without opinion the determination of the court of first instance, and the opinion of that court makes no mention of any federal question.

Petitioner concedes (petition, p. 5) that the federal question addressed to this Court was in fact raised for the first time on appeal to the Court of Appeals. Even there, incidentally, neither the executor of the will under which, as a residuary legatee, petitioner's claim is derived, nor any other of the residuary legatees under the same will found occasion to raise such a question. Neither was it raised in support of the applications for leave to appeal. It was, in fact, raised only in the briefs and on oral argument addressed to the merits of the appeal after leave had been granted.

Appeal to the New York Court of Appeals may be taken as of right if there be directly involved in a judgment of the Appellate Division a question under the Federal Constitution (New York Civil Practice Act, § 588(1)(a)); yet appellants did not claim such a right and, as already indicated, gained access to the Court of Appeals only through leave granted by the Court in its discretion (New York Civil Practice Act § 589; (R. 203-207)).

Under New York law the Court of Appeals uniformly refuses to consider a constitutional question unless raised in the lower court. *Matter of Joseph M. Carroll*, 305 N. Y. 692 (1953); *City of New Rochelle* v. *Closter*, 296 N. Y. 506 (1946); *Nod-Away Company* v. *Carroll*, 240 N. Y. 252 (1925). See Cohen and Karger, *Powers of the New York Court of Appeals* (Rev. Ed., 1952), pp. 251-252; 641-643.

Petitioner concedes this New York rule but argues (petition, p. 5) that it is limited to cases involving statutory interpretation. There is no such limitation, and this is as much apparent from petitioner's inability to cite authority for such a limitation as from the broad language used in the very cases cited by petitioner as representative of the New York rule. "Constitutional questions cannot for the first time be raised in this Court." *Nathan* v. *Equitable Trust Co.*, 250 N. Y. 250, 253 (1929); see also *Dodge* v. *Cornelius*, 168 N. Y. 242, 245 (1901).

Clearly the question could not have been presented to the Court of Appeals in accordance with the requirements of New York law, and it cannot be doubted, therefore, that that Court declined to pass upon the question. That it did not give any consideration to petitioner's claim of a constitutional issue is manifest from the absence of mention of any such claim in the official report of the Court of Appeals' affirmance (9 N. Y. 2d 808, 809).

Since the federal question was not seasonably raised in accordance with state law, this Court lacks jurisdiction now to consider it.

In *Edelman* v. *California*, 344 U. S. 357 (1953), the Court said, at page 358:

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law."

In arguing that this Court nevertheless has jurisdiction, petitioner urges that it "was not bound at its

peril to anticipate that the New York court of first instance, or its Appellate Division (both being two parts of the same court) would without any rational basis in the stipulated record deprive it of vested property." (petition, p. 5.) But petitioner knew from the outset that the basic issue presented to the court by the trustee for determination was whether reference should be made to Rhode Island or New York law in interpreting the indenture so as to effectuate the settlor's intent (R. 74). Petitioner offers no persuasive explanation for its failure to present the purported constitutional question in the court of first instance and no explanation whatsoever for its failure to present the question on its appeal to the Appellate Division.

Petitioner's contention is not supported by any of the three decisions relied upon (petition, pp. 5-6). In *Missouri* v. *Gehner*, 281 U. S. 313 (1930) and *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673 (1930), the judicial decisions which violated constitutional rights were made in the first instance by the state's highest court. Here, if any violation of petitioner's constitutional rights occurred it was embodied in the decision of the court of first instance. And in *Shelley* v. *Kraemer*, 334 U. S. 1 (1948), the constitutional question, having been seasonably raised, was passed upon by the state's highest court.

This record discloses neither any federal question nor any serious doubt that the New York Court of Appeals properly declined to consider the constitutional question now urged. Accordingly, this Court lacks jurisdiction to consider it.

POINT II.

This Case Involves No Federal Constitutional Question But Only Questions of State Law.

Petitioner claims, in substance, that the decisions of the New York courts were so without rational basis that they violated the "impairment of contracts" clause of the Constitution and deprived petitioner of vested property rights without due process of law. Stripped to essentials, petitioner's claim is that the New York courts effected this alleged impairment of contract and deprivation of property rights by applying to the interpretation of an *inter vivos* trust executed in 1916 by a resident of Rhode Island for the benefit of Rhode Island beneficiaries, rules of construction customarily applied in Rhode Island. Incidental to this, the petition asserts that the New York courts were mistaken as to the stage of development of Rhode Island law in 1916, although petitioner does not deny that the Rhode Island rule as to the treatment of stock dividends has never been any different than the New York courts found it to be.

Petitioner's position is without merit on each point it seeks to make.

Petitioner's contention that the New York courts violated the "impairment of contracts" clause of the Constitution can be very summarily disposed of. The "impairment of contracts" clause is directed only against impairment by legislation and not by judgments of courts. *Barrows* v. *Jackson*, 346 U. S. 249, 260 (1953); *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 451 (1924); *Krygier* v. *Wilson*, 242 U. S. 171, 177 (1916).

This is so unequivocal a rule that there is no need to pursue and expose the lack of any substance to petitioner's claim of contractual right, or its alleged impairment by action of the New York courts. Cf. *In re Allis' Will*, 6 Wis. 2d 1, 8 (1959).

No disregard of contractual or vested rights is remotely involved here, nor any failure of due process of law. This is purely and simply a case of trust interpretation or construction, the basic issue being whether the settlor intended stock dividends to be treated as principal or be allocated between principal and income. See *Equitable Trust Co. v. Prentice*, 250 N. Y. 1, 3, 9 (1928). No "property rule" is involved. Strictly speaking, the dispute does not even involve the conflict of laws. Rhode Island law and New York law were pertinent here only as guides to the New York courts in seeking the implied or probable or likely intention of the settlor.

In construing this instrument, the New York court determined that the settlor intended stock dividends to be treated as principal. His domicile in Rhode Island and his early background in Massachusetts (in both of which states it has long been presumed that settlors intend stock dividends to be treated as principal) were undoubtedly elements in the court's finding (R. 195). Adherence to the rules of interpretation and construction of the domicile in ascertaining a settlor's intention had been the stated policy of the New York courts for many years prior to 1916 and except for unusual cases remains the practice of the New York courts. *Curtis v. Curtis*, 185 App. Div. 391,

395 (1st Dept. 1918); *Cross* v. *United States Trust Co.*, 131 N. Y. 330, 339 (1892); *Parsons* v. *Lyman*, 20 N. Y. 103, 112 (1859); cf. *Hutchison* v. *Ross*, 262 N. Y. 381 (1933); *Shannon* v. *Irving Trust Co.*, 275 N. Y. 95 (1937).

Even if this case involved, strictly speaking, doctrines of the conflict of laws rather than a finding of intention in which conflict principles played a part, there would still be no federal constitutional question involved here. The doctrines of conflict of laws developed and applied by a state court are merely parts of the state's local common law with which this Court is not concerned.

In *Kryger* v. *Wilson*, 242 U. S. 171 (1916), this Court held, at page 176:

> "* * *. The most that the plaintiff in error can say is that the state court made a mistaken application of doctrines of the conflict of laws in deciding that the cancellation of a land contract is governed by the law of the *situs* instead of the place of making and performance. But that, being purely a question of local common law, is a matter with which this court is not concerned."

To be sure, on a few occasions, in extreme circumstances, this Court has taken jurisdiction under the "due process" clause where a state court has made a palpably erroneous and unfair choice of the applicable law. But, in those cases, there was either an unwarranted failure to recognize the validity, in a conflict of laws sense, of the law of another state or an unwar-

ranted extension of the law of the forum beyond its proper orbit. *E.g., Home Ins. Co.* v. *Dick*, 281 U. S. 397 (1930). This Court's intervention was necessary in such cases to correct peculiarly conspicuous error and to avoid a divisive parochialism resulting from the application of the forum's own law. See *Sampson* v. *Channell*, 110 F. 2d 754, 759 (1st Cir. 1941), *cert. denied*, 310 U. S. 650 (1941); cf. *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 497 (1941).

Here no such occasion exists for review by this Court. Here there is no case of unwarranted application of the law of the forum; the New York courts fully recognized and applied the more pertinent law of a sister state, on the strength of ample precedent for doing so going back into days prior to the creation of this trust. There was nothing "palpably erroneous" in their decision to do so. On the contrary, that decision accorded with the great weight of authority and with the stipulated facts. *Restatement* (~~*Second*~~), *Conflict of Laws* § 296 (~~1959~~).

By failing to appeal, petitioner has conceded that in the case of the testamentary trust under Arthur B. Emmons' will, there is ample rational basis for the New York court at the situs of the trust to apply the foreign law of the domicile to the very question involved in this *inter vivos* trust (petition, pp. 12, 13). This emphasizes the frailty of petitioner's claim that there is no rational basis for such application of Rhode Island law in the case of the *inter vivos* trust.

In attempting to find some basis for its claims that the New York courts had no grounds for applying

Rhode Island law under the circumstances, petitioner says (petition, pp. 24-26) that Rhode Island could not have assumed jurisdiction over this trust and (petition, pp. 22-24) that Rhode Island law on the subject of stock dividends had not been enunciated at the time when Mr. Emmons created this trust. Even if these premises were correct—which they are not—they would be quite immaterial in this proceeding. The issue here is one of presumed intention, not one of jurisdiction to determine that intention, and even if it were assumed that the Referee was mistaken as to the state of Rhode Island law in 1916, his error would not create a constitutional question. *Nickel* v. *Cole*, 256 U. S. 222 (1921). In fact, however, Rhode Island would have had jurisdiction to determine the issues in this case had the trustee elected to initiate the proceeding in Rhode Island, and the highest court of Rhode Island had already expressed itself at least three times prior to the execution of the trust indenture by Arthur B. Emmons in 1916, to the effect that stock dividends represent principal and not income of a trust. *Newport Trust Co.* v. *Van Rensselaer*, 32 R. I. 231 (1911); *Greene* v. *Smith*, 17 R. I. 28 (1890); *Brown's Petition*, 14 R. I. 371 (1884).

This Court itself, as early as 1890, had taken cognizance of the fact that such was the Rhode Island doctrine. In *Gibbons* v. *Mahon*, 136 U. S. 549 (1890), in holding that stock dividends should be treated as principal, this Court made the following observation:

> "And in Connecticut, Rhode Island and Maine, a dividend of new shares, representing accumulated earnings, is held to be capital and not income. *Brinley* v. *Grou*, 50 Conn. 66; *Brown's petition*, 14

R. I. 371; *Richardson* v. *Richardson,* 75 Maine, 570, 574." (136 U. S. at 564).

Rhode Island Trust Co. v. *Tucker,* 51 R. I. 507 (1931)—upon a phrase from the opinion in which petitioner relies to support its contention that Rhode Island first enunciated its law on the subject in 1931 (petition, pp. 22-23, 29-30)—merely presented the problem in connection with unproductive property for the first time and did no more than extend the established Rhode Island rule to periodic stock dividends issued in lieu of cash dividends. See *Note:* "Conflicting Claims of Life Tenant and Remaindermen to 'All Stock—No Cash' Dividends," 46 HARV. L. REV., 298, 302 (1933).

In short, the record discloses that the New York courts, in seeking to ascertain and give effect to Mr. Emmons' intent, simply applied a universally approved rule of interpretation which, in view of the language employed in this particular indenture and in view of the surrounding facts and circumstances of this particular case, called for recourse to Rhode Island rules of interpretation.

The disposition by the New York courts was entirely consistent with all applicable precedent. Not only was there a completely rational basis for seeking the settlor's intention in the body of the law most familiar to him—that of his home—but there would have been little or no justification for imposing upon him and his Rhode Island beneficiaries concepts of the forum with which he and they were presumably unfamiliar.

CONCLUSION

The petition is entirely without merit, as well as jurisdictionally deficient, and should be denied.

Respectfully submitted,

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REPLY OF PETITIONER TO BRIEF IN OPPOSITION.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

REPLY OF PETITIONER TO BRIEF IN OPPOSITION.

This brief replies to the "Brief in Opposition" of certain respondents, Humphrey, *et al.*

The other respondents, The Bank of New York as Executor of the Will of Julia Emmons, *et al.*, have acquiesced in the petition for certiorari and requested that the same be granted.

Jurisdiction.

The jurisdiction of this Court is demonstrated in the petition for certiorari and emphasized by the grounds sub-

mitted in support of petitioner's pending motion for leave to file in this Court copies of its separate briefs in the Court of Appeals.

Here, petitioner simply points out that the reliance of respondents Humphrey, *et al.*, on two cases in this Court is misplaced. In *Edelman* v. *California*, 344 U. S. 357, the unconstitutionality of a *statute* was not raised on trial as required by state law. In *Lynch* v. *New York*, 293 U. S. 52, it was clear that the New York Court of Appeals could have determined that its own constitution and New York statutes forbade the taxation—an independent state ground for decision.

The Merits.

A.

The Brief in Opposition misapprehends what the courts below did. Those respondents claim there is no conflict of laws question. This record involves conflict of laws, and nothing else, as shown by the following:

1. The original order of the New York County Supreme Court decreed that the moneys should be "allocated to the principal of said trust in accordance with the law of Rhode Island" and the order further provided that corporate distributions "should be governed by the law of Rhode Island, and said Indenture is hereby so construed" (R. 24).

2. The order of the Appellate Division of the Supreme Court, in affirming the original order, recited that it provided that the "Indenture dated May 8, 1916 should be governed by the law of Rhode Island" (R. 212).

3. The Remittitur of the Court of Appeals affirmed the order of the Appellate Division (A. 3 to petition for cer-

tiorari). The Order on Remittitur recited that the initial order, twice affirmed, provided that corporate distributions "should be allocated to the principal of said trust in accordance with the law of Rhode Island", and recited further that corporate distributions "should be governed by the law of Rhode Island" (A. 6 to petition for certiorari).

4. The original petition of the Trustee (R. 71, Paragraph 23) stated the Trustee's understanding that it should apply the "Osborne Rule of New York Law", and the second prayer for relief (R. 74) requested permission to do so.

A conflict of laws issue was framed by the pleadings. All courts below chose the property law of one state, to the exclusion of the property law of another state, to determine conflicting rights to property. The courts below gave legal effect to the words of an instrument in accordance with the law chosen. The courts below did not purport to do anything else. Such respondents are therefore entirely mistaken when they state (Br. in Op., p. 12):

> "Strictly speaking, the dispute does not even involve the conflict of laws."

The laws of the two states are in square conflict. The courts chose Rhode Island law which divested the petitioner of property vested under New York law.

B.

We point out in our petition that this is the first accounting in the history of the trust from 1916 to the present (Petition, p. 8; R. 152). Our adversaries seek to draw attention away from this fact (Br. in Op., p. 5). They assert, with absolutely no support in the record, that stock dividends "were received by the Trustee and were credited to and retained in the principal account of the Trust (R. 163)"

(Br. in Op., p. 5). Their reference to the record is to a stipulated list of "stock dividends declared" during the lifetime of Emmons. The stipulation does not refer at all to "principal".

Thus, the statement of our adversaries is not only totally inaccurate and unsupported by the stipulation, but it is grossly misleading. Moreover, it is in direct contradiction to the Trustee's own understanding as set forth in Paragraph 23 of the original petition (R. 71) that stock dividends were to be apportioned under New York law.

Nor is our adversaries' contention supported by two letters which showed that the Trustee quite early took steps in accordance with New York law in crediting the proceeds of sales of fractional shares to income (R. 171, 181). Apparently, our adversaries contend that Rhode Island law crept in *sub silentio* because the Trustee did not expressly refer to New York apportionment of whole shares in such letters, although its actions were consistent with New York law.

Whatever tenuous inference (which petitioner believes to be in the direction of New York law) might be drawn, would, however, be irrelevant and *de minimis*. Certainly, reference in two letters to $68.88 and $67 (total $135.88) is not an accounting for a $3,600,000 fund. At that time, Emmons would not have been a party to, or had any standing upon, an accounting, and letters from the Trustee could not relate back six and seven years respectively to "reform" the irrevocable New York agreement under seal and "rescind" the New York conveyance of New York property.

Petitioner could, with at least equal justification, ask this Court to determine that New York law governed solely on the basis of two letters (R. 166 and 167) of 1916 and 1917 addressed to Mr. Emmons at 60 Park Avenue, New York City. But where sealed instruments and conveyances are

concerned, we respectfully submit that resort to correspondence is a confession of weakness.

C.

The petition for certiorari points out that an intermediate accounting of the testamentary trust of Mr. Emmons was judicially settled in 1929 (Petition, p. 13, R. 36). Such trust is not before this Court. But respondents claim there is a weakness in petitioner's case, because we do not contend that New York law governs such testamentary trust (Br. in Op., p. 14). In the first place, petitioner Tuskegee Institute admitted the Trustee's original petition which requested permission to apply Rhode Island law to the testamentary trust (R. 71). The record shows that the Will was executed in Rhode Island (R. 94), that Rhode Island property passed thereunder (R. 90, 91), that it was probated in a Rhode Island court, and that the testamentary trustee went into the state of Rhode Island and qualified in Rhode Island state as testamentary trustee (R. 36). Finally, the question of corporate distributions in the form of stock dividends is specifically referred to in connection with the largest asset of the estate passing under the Will (R. 91).

It is not relevant for respondents to tax petitioner for failing to urge here a point for which petitioner has not contended.

It is clear that the character of a New York agreement and conveyance cannot be changed by the fact that eight years later one party thereto transferred different property in a different state.

Conclusion.

Denial of due process of law by judicial decision, twice affirmed in a state's courts, is no less effective to confer jurisdiction on this Court than is abrupt denial in the state's highest court. For the reasons stated in the petition for certiorari, the petition should be granted.

Respectfully submitted,

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MOTION FILED SEP 2 1961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 178.

TUSKEGEE INSTITUTE,

Petitioner.

v.

THE BANK OF NEW YORK, as Trustee of the Trust Established by ARTHUR B. EMMONS, by Indenture
THE BANK OF NEW YORK, as Trustee of the Trust Established by ARTHUR B. EMMONS, by Indenture Dated May 8, 1916, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION.

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MOTION.

TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner TUSKEGEE INSTITUTE moves this Court for permission to file nine (9) copies of its brief and reply brief submitted to the New York Court of Appeals for the sole and limited purposes of showing:

(1) The Court of Appeals was specifically informed of its own jurisdiction over, and responsibility to decide, federal constitutional questions.

(2) The federal constitutional questions were inescapably before the New York Court of Appeals.

(?) The federal constitutional questions here are identical to those before the Court of Appeals. Much of the petition for certiorari is comprised of substantially verbatim portions of such briefs.

This motion is compelled by the fact that the Brief in Opposition in behalf of respondents, Humphrey, et al, gravely misapprehends New York jurisdiction and the jurisdiction of this Court. While appearing to concede that constitutional issues were "set up", such respondents deny that the issues were "claimed".

The Grounds for this Motion are as Follows:

1. Petitioner's briefs show that the Court of Appeals was specifically informed of its own jurisdiction over and responsibility to consider constitutional questions. It was also informed of the jurisdiction of this Court over federal constitutional issues. Petitioner cited *Saunders* v. *Shaw*, 244 U. S. 317, and *Missouri, ex rel. Missouri Insurance Co.* v. *Gehner*, 281 U. S. 313, to the Court of Appeals on this point in its main brief filed in the Court of Appeals on November 25, 1960. Argument in the Court of Appeals was held on February 7, 1961, and its decision was rendered March 30, 1961. The constitutional issues, and the jurisdiction of this Court and of the Court of Appeals over such constitutional issues, were squarely before the Court of Appeals for a period of 126 days. This is certainly more ample notice to the state court than the one day notice described for a unanimous Court by Mr. Justice Holmes in the *Saunders* case, *supra*, as follows:

> "The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the 14th Amendment until the assignment of errors filed the

day before the chief justice of the state granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation. Home Teleph. & Teleg. Co. *v.* Los Angeles, 227 U. S. 278, 57 L. ed. 510, 33 Supt. Ct. Rep. 312. It appears that shortly after the supreme court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of the state by his assignment of errors. We do not see what more he could have done.

Judgment reversed."

In that case, the state court was not given even a last clear chance—it was given a Parthian volley. In the case at bar, the notice of four months prior to decision, set forth in petitioner's two briefs and replied to in five briefs of respondents, was more than adequate. Respondents seem to argue for the proposition that it is, under this Court's decisions in *Saunders, supra, Gehner, supra,* and *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, a prerequisite to this Court's jurisdiction for a litigant, first to entrap the highest court of a state on constitutional issues, and thereafter bring the points before such court on reargument. The Petition for Certiorari correctly states (p. 6) that the constitutional questions did not "steal upon an unsuspecting" Court "and

pass unobserved". *M'Culloch* v. *State of Maryland*, 4 Wheat. 316, 402.

2. A jurisdictional problem can be contrived only if there is confusion as to the nature of the petition for certiorari herein. Where it is contended that the decision of a court is itself unconstitutional, having no rational basis in the record, nothing prior to such decision is controlling for jurisdictional purposes. Here, on this stipulated record, it is contended that the Court of Appeals' decision is unconstitutional on its face. Such a decision cannot be anticipated, because the underlying assumption of the judicial process is that a decision will have a rational basis. A pleading is to be factual, not presumptuous.

3. In the two divisions of the court of first instance, petitioner Tuskegee Institute was bound to anticipate that binding decisions of the highest court of the state would be followed.

Petitioner was also bound to anticipate that the Court of Appeals would follow its own decisions. Petitioner strenously urged that it do so. But since the Court of Appeals was free to depart from its former decisions, petitioner explicitly pointed out that to do so on this record would violate federal constitutional rights. Petitioner did so in two briefs. By way of emphasis, our reply brief below (p. 10) stated "We press these points".

4. Where lack of reason in a Court's decision works deprivation of constitutional rights, that issue can be met only by forewarning on brief and oral argument. This is in contrast to an unconstitutional statute, which obviously must be pleaded at the outset. Petitioner here does not seek to show that a statute is unconstitutional. It is likewise in contrast to deprivation of constitutional rights upon trial, which must be shown in the trial record. In this case there

was no trial, but a stipulation of facts. Petitioner does not seek to show that anything in the stipulation of facts is unconstitutional. Petitioner seeks only to show that upon a specific stipulated record, the same record before all the courts below, the decision of the Court of Appeals is unconstitutional in lacking a rational basis.

Petitioner could not anticipate that either division of the court of first instance would fail to follow the substantive law and the conflict of laws rules of New York, so emphatically and broadly stated by the highest court of that state in *Matter of Osborne* 209 N. Y. 450 and *Hutchison* v. *Ross* 262 N. Y. 381. Therefore, petitioner should not have set out in a pleading so many potential evils as to describe the chamber of horrors in a Gothic Romance, requiring for their avoidance prayers for deliverance and relief so broad, detailed, and varied as to encompass the Litany. A litigant could no more draw such a pleading than Edmund Burke knew how to draw an indictment against a whole people.

5. All five cases cited by respondents (Brief in Opposition, pp. 8-9), where the Court of Appeals has declined to consider constitutional questions not raised below, involved *statutes*. *Matter of Joseph M. Carroll*, 305 N. Y. 692 (New York City Charter and administrative code); *City of New Rochelle* v. *Closter*, 296 N. Y. 506 (tax statute); *Nod-Away Company* v. *Carroll*, 240 N. Y. 252 (rent control statute); *Nathan* v. *Equitable Trust Co.*, 250 N. Y. 250 (tolling of limitations statute during enemy alienage); *Dodge* v. *Cornelius*, 168 N. Y. 242 (statutory penalty). The unconstitutionality of a statute must be pleaded.

6. The treatise relied upon by our adversaries, Cohen & Karger, *Powers of the New York Court of Appeals*, (1952) page 624, states that there is no constitutional or statutory provision limiting the jurisdiction of the Court

of Appeals with respect to questions not presented to the courts below. Such treatise proceeds to discuss (pp. 626-627) the leading case in New York *Persky* v. *Bank of America National Assn.*, 261 N. Y. 212, wherein the Court of Appeals stated:

> "Where the facts found or conclusively proven do not justify the conclusions of law upon which judgment rests, it is not too late to point out the error in an appellate court, even though the original error was due in whole or in part to lack of timely care or wisdom on the part of counsel" (261 N. Y. at 218).

Thereafter such treatise refers to the "dubious basis" (p. 643) of any limitation whatever on questions before the Court of Appeals. Obviously, the language in statutory opinions cannot be construed so broadly as to refer to unconstitutional decisions, which by their nature can be discussed only on brief. Otherwise, the holdings of this Court in the *Saunders, Gehner,* and *Brinkerhoff-Faris* cases, *supra,* would be rendered meaningless.

7. The New York Legislature has not permitted any extension to other areas of the holdings that the Court of Appeals will not consider the unconstitutionality of a statute which is not raised below. As long ago as 1939 the Civil Practice Act was amended to prevent miscarriages of justice by providing in Section 592 (5) (2) that if permission to appeal were denied, a litigant would have an additional 30 days to appeal as of right, (i.e. on a constitutional question). *Cohen* and *Karger, supra,* state:

> "In 1939, however, the Legislature provided a solution by granting the appellant in such a case an additional thirty days from the date of the dismissal of his motion for leave to appeal, within which to take his appeal as of right" (p. 352).

The Legislature, therefore, has deliberately conferred three distinct, seriatim methods of appeal, each with a later time limitation. The appellant from a final order has three strings to his bow. Diligent counsel may, as here in the case at bar, apply first to the Appellate Division for permission to appeal, and if refused then to the Court of Appeals, and finally appeal as of right. The learned authors of such treatise relied upon by our adversaries also stated that if review is obtained by permission,

> "The scope of review is the same as if the case were appealable as of right" (p. 353).

8. Obviously, from the nature of this case as a review of a judicial decision and not of a statute, and from the Civil Practice Act itself, it is plain that there can be no merit to respondents' position that although petitioner may have "set up" constitutional questions below, it failed to "claim" deprivation of constitutional rights simply because the appeal was by permission. The Legislature itself has done away with what may formerly have been a perilous election of remedies upon an appeal.

For the foregoing reasons, it is respectfully submitted that the motion should be granted for the limited purposes set forth.

Respectfully submitted,

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioner TUSKEGEE INSTITUTE, prays that this Court grant rehearing of its order of October 9, 1961 denying the petition for a writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York in the above entitled case as prayed for in the petition filed June 24, 1961 herein.

Reasons for Granting Rehearing and Issuing the Writ.

This petition is made pursuant to Rule 58(2) of the Rules of this Court.

I.

The first ground now urged underlies and embraces the ground heretofore urged. The ground heretofore urged—that there was no rational basis for ousting New York law and applying Rhode Island law—is a special case of the more general ground now urged. In an effort to be precise we have heretofore presented a special case, and an example of the application, of the underlying general ground which is now presented by this petition for rehearing.

It is here submitted and urged as a ground for granting the petition for certiorari that respondents have obtained judgment on a matter which ceased to be justiciable upon their pleadings and the sole stipulated issue of "law governing" (paragraph 13 of stipulation, R. 161) and upon the making of the stipulation of facts. The stipulation was the "trial". Respondents failed to state facts sufficient to constitute a cause of action for the relief which they prayed, or sufficient to state a defense to the relief prayed in the Trustee's original petition. No facts were stipulated upon which the judgment granted in their favor could be founded. Their defense was insufficient in law—the "general law" of *Truax* v. *Corrigan*, 257 U. S. 312, 331-334.

Upon the submission of the stipulated record to the court of first instance, there no longer remained any "case" or "controversy". The adverse respondents stipulated their answers into legal insufficiency, requiring judgment in favor of Tuskegee in accordance with the original petition of the Trustee.

The pleadings and stipulation as to the sole issue—"law governing", and the stipulation of facts, preclude there being any legal or factual basis upon which relief could be

granted in favor of adverse respondents, or denied to the Trustee.

It is fundamental to the concept of the "general law", the protection of which petitioner claims, that it may not be deprived of property, except upon a case or controversy. Petitioner's fundamental right is a constitutional guaranty of a judicial process which has a coherent and consistent basis in the traditional methods of judicial thinking, operating upon facts and principles. *N. A. A. C. P.* v. *Gallion* —— U. S. ——, No. 303 (October 23, 1961).

Specific examples and applications of this underlying principle urged here are discussed in our petition for certiorari. In *Tot* v. *U. S.*, 319 U. S. 463, the infirmity was the substitution of an automatic "strained" presumption for the rational process of judicial thinking (discussed at pp. 23-24 of the Petition for Certiorari). In *Thompson* v. *Louisville*, 362 U. S. 199, there was no evidence whatever to support the conviction (pp. 16, 37 of petition for certiorari). Both of these cases are narrower applications of the fundamental principle of the "general law" which we rely on here, as expressed in *Truax* v. *Corrigan, supra*, and *N. A. A. C. P.* v. *Gallion, supra*. These cases hold that the underlying constitutional right is the right to the judicial process.

This Court's powers are plain, as shown by *Saunders* v. *Shaw*, 244 U. S. 317, *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 N. Y. 313 and *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, which we have previously relied on before this Court. We present below authorities which we have not previously presented to this Court, which show not only that the New York Court of Appeals had the power to pass upon the federal constitutional issues before it in this case, but it also had the duty imposed by statute to pass upon them, and was required by its own decisions to do so.

The New York Civil Practice Act provides:

> "§279. Certain objections not waived.
> An objection as to the jurisdiction of the court, except as otherwise provided in the preceding section, and the objection that a complaint, or a statement therein of a separate cause of action, or a counterclaim, does not state facts sufficient to constitute a cause of action, or that a *defense is insufficient in law upon the face thereof*, are not waived by failure to raise the same before trial." (Emphasis added.)

The Court of Appeals in *Teller* v. *Prospect Heights Hospital*, 280 N. Y. 456 (1939) stated at page 458:

> "The appellant asserts that the complaint is insufficient as matter of law in that it fails to state a cause of action. Our decision is confined to the question certified, but, in answering that question, we *must* determine before proceeding further as to whether the complaint states a good cause of action. (*Salimoff & Co.* v. *Standard Oil Co.*, 237 App. Div. 686; affd., 262 N. Y. 220; *Baxter* v. *McDonnell*, 154 N. Y. 432; *Emery* v. *Rochester Telephone Corp.*, 271 N. Y. 306), *although the question is first raised in this court* (*Small* v. *Sullivan*, 245 N. Y. 343)." (Emphasis added.)

In the first paragraph of *Small* v. *Sullivan*, cited above by the Court of Appeals, it was stated

> "CRANE, J. These appeals come here upon seven questions certified by the Appellate Division relating to the sufficiency of the defenses set up in the answers. The main argument, however, has centered about the sufficiency of the complaint which apparently was passed over by counsel in the courts below. The Appellate Division in its opinion says: 'As defendants have decided to reserve for the present all questions as to the sufficiency of the complaint,

> we assume that it states a cause of action of the general character indicated above.' However, under the rule that an attack upon an affirmative defense enables the defendant to question the sufficiency of the complaint (*Baxter* v. *McDonnell*, 154 N. Y. 432; *Manson* v. *Curtis*, 223 N. Y. 313, 319), the defendants in this Court have raised this question and we ***must*** dispose of it before dealing with the answers." (Emphasis added.)

Therefore, it is fundamental that where a pleading is insufficient in law, or where a party stipulates itself into legal insufficiency as did respondents here, the Court of Appeals not only *will* pass upon the question, but it has stated that it "*must*" pass upon the question. This provision of the C. P. A. is, of course, not affected by Rule 106 of the Rules of Civil Practice which *permits* a motion to be made to the court of first instance to determine the sufficiency of a pleading or jurisdiction over the subject matter at any time prior to trial.

The true meaning of Section 279 of the C. P. A. is that there are certain deficiencies which cannot be obviated. Neither waiver nor stipulation by the parties can create jurisdiction over a matter which is non-justiciable, or beyond the jurisdiction of a court, nor can parties create a cause of action where none exists. Obviously, where a party stipulates away any defense which his pleading might have raised, the Court of Appeals must and will pass upon this point.

The true criterion distinguishing between the matters which must be raised below and the matters which can be raised for the first time in appellate courts in New York, including the Court of Appeals, is whether the difficulty could have been "obviated" had it been raised earlier. Lack of jurisdiction over the subject matter, or failure of

a pleading to state a cause of action or a defense cognizable at law, cannot be obviated, and may be raised at any time.

By contrast, the preceding Section of the C. P. A. (§278) requires certain objections, including *personal* jurisdiction, to be raised by motion, or else they are waived. The matters referred to in Section 278 are those which can be obviated before trial.

In the case at bar, there was a stipulation of facts and a stipulation of the sole legal issue—"law governing" (paragraph 13, R. 161). The stipulation was in lieu of a trial. The effect of the stipulation is the same as if adverse respondents admitted on the witness stand the insufficiency of their defense and confessed judgment on the facts.

It is absolutely clear that matters which cannot be obviated may be raised for the first time in the New York Court of Appeals. The latest statement from the New York Court of Appeals, *Matter of Kaplan*, 8 N. Y. 2d 214 (1960) contained the following:

> "It appears that in the present case this lack of subpoena was not raised by appellant in the courts below but being jurisdictional and conclusive, it may be acted on by us especially since the omission was not one which could have been supplied if attention had been called to it below (see *Persky* v. *Bank of America Nat. Assn.*, 261 N. Y. 212; Cohen and Karger Powers of the New York Court of Appeals, Section 161)."

By citing *Persky* in this connection, the Court of Appeals shows that it is no more estopped to correct legal or constitutional mistake, than it is to correct jurisdictional defect. We have relied upon the *Persky* case, *supra* in our motion here (p. 6) and quoted the following from it:

> "Where the facts found or conclusively proven do not justify the conclusions of law upon which

> judgment rests, it is not too late to point out the error in an appellate court, even though the original error was due in whole or in part to lack of timely care or wisdom on the part of counsel" (261 N. Y. at 218).

Thus, the Court of Appeals has itself conclusively and recently held that fundamental and fatal defects in a judicial decision may be raised before it for the first time. This, of course, has always been the law of New York. See *People* v. *Jung Hing,* 212 N. Y. 393 at 404; *People* v. *Tobin,* 176 N. Y. 278; *Scott* v. *Morgan,* 94 N. Y. 508; *Beekman* v. *Frost,* 18 Johns 544.

We here rely upon the fact that, in accordance with Section 279 of the C. P. A., the defenses of respondents Humphrey, *et al.* were "insufficient in law upon the face thereof" in the language of Section 279 of the C. P. A., since they had stipulated such facts as to make the relief which they requested, *i. e.,* the application of Rhode Island law, repugnant to the due process clause of the federal constitution. We think it also of assistance to this Court to point out that the editors of 9 Carmody-Wait *Cyclopedia of New York Practice* 414, at Section 208, draw the same distinction which we drew in our motion, that it is only *statutory* unconstitutionality which must be raised in the lower courts in New York. We have distinguished statutory questions from unconstitutional judicial decisions in our motion heretofore granted by this Court.

Summary of this Ground.

1. The Trustee on behalf of petitioner and those similarly situated alleged in paragraph 23 of its original petition that New York law governed and prayed in its second prayer for relief for an order to that effect.

2. Adverse respondents denied this allegation and some of them alleged affirmative defenses that Rhode Island law governed.

3. The sole stipulated issue was "law governing".

4. The stipulated facts precluded reference to or application of any law except New York law.

5. The defenses of adverse respondents were stipulated into legal insufficiency (i.e. confession of judgment upon trial).

6. The Court of Appeals was bound by the Section 279 of the Civil Practice Act and its decisions above referred to, especially *Matter of Kaplan* and the *Persky* case, to render judgment in favor of petitioner and those similarly situated.

7. The judgment of the Court of Appeals is repugnant to the due process clause as construed in *Truax, supra, Tot, supra, Thompson, supra,* among others referred to in our petition for certiorari and hereinafter.

II.

As a separate and distinct ground available to petitioner and not heretofore presented, petitioner has been deprived of equal protection of the law of the State of New York and equal protection of the due process clause of the federal constitution—the "general law". *Truax, supra, N.A.A.C.P.* v. *Gallion, supra.* This denial of equal protection flows from failure to apply §279 of the C. P. A.; *Matter of Kaplan, supra; Persky, supra; Matter of Osborne,* 209 N. Y. 450; and the New York conflict of laws rule of *Hutchison* v. *Ross,* 262 N. Y. 381. In that case the Court of Appeals stated

that the conflict of laws rule must have "certainty" and "uniformity" and rights could not be denied at "pleasure or caprice". See pp. 19-20 of petition for certiorari. By excruciating coincidence, the agreement in that case was made in 1916, the same year as the agreement in the case at bar (262 N. Y. at 386).

III.

Petitioner relies on the ground available to it but not previously presented that objections by adverse respondents to this Court's jurisdiction rested upon a mistaken premise.

Such respondents argue, in effect, that there was a change in theory in this case. Paragraph 12 of the Stipulation (R. 160), where petitioner's attorneys together with attorneys for those similarly situated, declined to adopt any "theory" of the case except "law governing" (par. 13 of stipulation) states:

> "(12) Of the undersigned, the following attorneys: Alexander & Green; Lord, Day & Lord; Patterson, Belknap & Webb; Davis, Polk, Wardwell, Sunderland & Kiendl; O'Connor & Farber; Satterlee, Warfield & Stephens; Parker, Duryee, Benjamin, Zunino & Malone; Hawkins, Delafield & Wood stipulate to the facts herein without, however, conceding their materiality or relevance to the issues in this proceeding."

In "I" above we have shown that the Court of Appeals must consider the fundamental questions involved here, both by statute and under its own decisions. The entire basis for adverse respondents' challenge to this Court's jurisdiction rests upon an inarticulate premise that there

was a change in theory. This premise is contrary to paragraph 12 of the stipulation.

We urged in the Court of Appeals the unconstitutional *consequences.* The theory that New York law governed remained the same in all courts below and remains the same here.

The theory of our case from paragraph 23 of the Trustee's original petition, through the stipulation, through all courts is that New York law is the "law governing". This theory of governing law, therefore, appears on the face of the record from the inception of the case and is expressly referred to in all court orders. See pp. 2-3 of our "Reply of Petitioner to Brief in Opposition".

Adverse respondents are the only persons who seek to change the "theory" of the action here by arguing (Br. in Op. p. 12)

> "Strictly speaking, the dispute does not even involve conflict of laws."

But paragraph 13 of the stipulation, following the pleadings stated that "the issue of the law governing" should be submitted to the court of first instance.

IV.

Petitioner has not heretofore pointed out that the decision below permits the full faith and credit clause to preempt all constitutional ground and reduces the due process clause to a nullity.

This Court has left standing a decision which gives extraterritorial and retroactive effect to the law of a particular state over property which was not within that state, an agreement which was not executed in that state and which was a stranger to its law, and over a trustee which was never in that state.

The decision left standing permits a legislature or a court to act upon property, persons, and instruments previously thought to be secure and to enjoy the protection of the law of the state specifically embraced by such instruments, the state wherein the property is situated, and the state where the persons who hold such property permanently are situated.

The case below stands for the proposition that a state, by retroactive fiat can reach outside its borders and divest property which has heretofore been the exclusive concern of the state, in this case New York, where the trustee at all times has been, where the property has at all times reposed, and the law of which was expressly incorporated by the parties to an instrument. All this has been done retroactively, because the law of Rhode Island, as shown throughout our petition, was not pronounced until fifteen years after all relevant events.

If New York law *must* accept this extraterritorial and retroactive Rhode Island law, then the due process clause is wholly subjected to the full faith and credit clause. If New York *elects* to accept this Rhode Island law, and attribute to it retroactive and extraterritorial effect, then there is no rational basis for New York's action, and the due process clause is similarly rendered nugatory.

Put another way, we contend that it is absurd to say that the full faith and credit clause preempts all constitutional ground, leaving no room for due process. Since due process of law in New York precludes the retroactive and extraterritorial effect of the Rhode Island judicial decision establishing the substantive law of Rhode Island, petitioner is entitled, as a bare minimum of ordered liberty and protection of its property rights to have New York courts find "law governing" in accordance with rational judicial process. *Truax* v. *Corrigan, supra.*

To support the decision below it must be found that Emmons prophesied and foretold the promulgation of an extraterritorial and retroactive property rule by a state wholly devoid of jurisdiction over the property, or the agreement or the trustee. The assumed prophecy, then, is hardened into an automatic presumption, in spite of the fact that Emmons expressly adopted New York law. Law governing property was selected on assumed prophecy. Neither Emmons, nor the Trustee, nor any party to this proceeding was a party to the Rhode Island proceeding where the extraterritorial rule was promulgated.

The constitutional limitations on choice of law have been before this Court many times. The questions usually come up in terms of "jurisdiction" or "substance" as contrasted with "procedure". The indissoluble connection between due process and full faith and credit is frequently referred to. We submit that the proper balancing of these two provisions underlies all the thinking of this Court from *Pennoyer* v. *Neff*, 95 U. S. 714, to the present.

This connection is clearly described in an article by Russell J. Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 Iowa L. R. 449 (1959). We do not elaborate this petition for rehearing to discuss the points made by Professor Weintraub, except to say that he has distilled from this Court's most recent opinions, and from *Home Ins. Co.* v. *Dick*, 281 U. S. 397, a rule identical to that proposed in the *Restatement* (*Second*) *Conflict of Laws*, §43(e), (Tent. draft No. 3, 1956) which we quote and discuss at pp. 24-26 of our petition for certiorari. His conclusion is that a state violates the due process clause if it applies the law of another state to a state of facts over which such other state would have had no legislative jurisdiction.

This conclusion of the draft Restatement and of the article above referred to is required by the opinion of this Court, per Mr. Chief Justice Stone, in *International Shoe Co.* v. *Washington*, 326 U. S. 310. There were not in the case at bar any quantitative or qualitative contacts with Rhode Island, from which Emmons departed in order to do acts in New York and refer to its law. No acts were done in Rhode Island. No consequences were caused in Rhode Island. This case does not involve the *dis*connection or *es*trangement of Rhode Island from the facts. Rhode Island was always *un*connected with and a total stranger to the facts.

We do not cite foreign authority as precedent for interpretation of a written federal constitution. But since due process is, at the least, a concept of ordered liberty, we feel no surprise that other jurisdictions should come to the same conclusion as that which we believe is compelled in the case at bar. Viewing what was done below as the extraterritorial and retroactive divesting and confiscation of New York property by a new law of Rhode Island, we invite this Court to consider:

> *Bank voor Handel en Scheepvaart N. V.* v. *Slatford* [1952] All E. R. 956;
> *Re Helbert Wagg & Co.'s Claim* [1956] 1 All E. R. 129 (Ch.) *at* 138.

See also

> *Government of the Republic of Spain* v. *National Bank of Scotland*, 1939 S. C. 413.

These cases are referred to in an article which squarely faces "time" as well as "space" in the conflict of laws. Erwin Spiro, *The Incidence of Time in the Conflict of Laws*,

9 *Int. and Comp. L. Q.* 357 (1960). We will not burden the Court with an analysis of that author's reasoning or conclusions, except to say that his view is that courts have held that a new law cannot be applied in another country, if the movable concerned is situate outside the legislating state at the time of legislation.

The same conclusion appears in Dicey's *Conflict of Laws* (Seventh Ed. 1958), where at page 663 it is stated "• • • and in practice our courts have tended to construe decrees so as not to give them extraterritorial operation whenever possible."

(Without here going into the English concept of "proper law of the contract" it is of persuasive value that at page 728 of Dicey, *supra*, it is also pointed out that if it is expressly stated "that one part or aspect of a contract is to be governed by a certain law, it may be presumed that this was contemplated as the proper law of the contract as a whole • • •".)

Since we argue in our petition that when Emmons came into New York in 1916 he incorporated in his agreement and conveyance the property rule of *Matter of Osborne*, 209 N. Y. 450 (1913), the existing law of New York, we are unable to see how a rule of Rhode Island property law announced for the first time fifteen years later in *Rhode Island Hospital Trust Co. et al.* v. *Tucker*, 51 R. I. 507 (1931) can be held to govern this case, unless it is now to be law in our federal system that Rhode Island law can be given extraterritorial and retroactive effect to confiscate New York property.

We submit further that the New York courts are not free to apply or fail to apply a settled New York conflict of laws rule, but having adopted the rule, must apply it consistently to similarly situated cases. Even if a particular conflict of laws rule were not itself required by due process.

the even and consistent application of such rule is required by due process. Here, we refer again to the fact that the trust agreement in *Hutchison* v. *Ross*, 262 N. Y. 381, which requires New York law to govern the property involved in this case, was itself executed in 1916, the same year as the execution and conveyance by Emmons (262 N. Y. at 386). See pp. 8-9 hereof.

Professor Weintraub, properly we believe, points to an element in due process decisions of this Court which he describes as "unfair surprise". He believes it proper that this Court should refuse to apply law of a state with fortuitous contact with a transaction. He believes this element of surprise to be significant in *John Hancock Mut. Life Ins. Co.* v. *Yates*, 299 U. S. 178, and *Hartford Acc. & Ind. Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, and other cases therein referred to (Weintraub, *supra*, pp. 457-460). But neither that learned author, nor this Court, have found unfair surprise in situations where a party has qualified to do business in a state or otherwise intentionally come into that jurisdiction to do business in that jurisdiction. See, for example, *Watson* v. *Employers Liab. Assur. Corp.*, 348 U. S. 66. It could never be contended that the element of unfair surprise could arise in this case by applying New York law, since Emmons came into New York, expressly adopted New York law, made an agreement in New York, and transferred property in New York which has continued to be in New York. The only element of unfair surprise that can arise is to give extraterritorial and retroactive effect to a Rhode Island property rule promulgated fifteen years after all events and six years after Emmons died.

Conclusion.

For the foregoing reasons and those set forth in the petition for writ of certiorari it is respectfully urged that rehearing be granted, and that upon such rehearing a writ of certiorari issue to the Court of Appeals of the State of New York and the case be heard by this Court. In the alternative, we respectfully urge that the petition for certiorari be granted, the judgment herein be vacated, and the case remanded to the Court of Appeals of the State of New York with directions to set forth any grounds which afford a basis for a decision on state law. *Musser* v. *Utah*, 333 U. S. 95; *Herb* v. *Pitcairn*, 324 U. S. 117; *Burton* v. *Wilmington Parking Authority*, 365 U. S. 730 (dissenting opinion by Mr. Justice Frankfurter).

October 31, 1961

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 of the rules of this Court.

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